90-1038

(2)

No.

In The

Supreme Court of the United States

October Term, 1990

THOMAS CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

APPENDIX

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TABLE OF CONTENTS

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 5, 1990

Antonio CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

v.

LIGGETT GROUP, INC., a Delaware Corporation; Philip Morris Incorporated, A Virginia Corporation, and Lorillard, Inc., A New York Corporation.

Appeal of PHILIP MORRIS, INC.

Appeal of LORILLARD, INC.

Appeal of LIGGETT GROUP, INC.

Nos. 88-5732, 88-5570, 88-5771, 88-5784.

United States Court of Appeals,
Third Circuit.

Argued March 28, 1989.

Decided Jan. 5, 1990.

Marc Z. Edell (argued), Cynthia A. Walters, Budd Larner Gross Picillo Rosenbaum Greenberg & Sade, P.C., Short Hills, N.J., Alan M. Darnell, Wilentz, Goldman & Spitzer, Woodbridge, N.J., for appellant Antonio Cipollone.

Thomas E. Silfen (argued), Brown & Connery, Westmont, N.J., Arnold & Porter, Washington, D.C., Shook, Hardy &

Bacon, Kansas City, Mo., for appellant Philip Morris, Inc.

Robert E. Northrip (argued), Rhonda E. Fawcett, W. Edward Reeves, Shook, Hardy & Bacon, Kansas City, Mo., William S. Tucker, Jr., Stryker, Tams & Dill, Newark, N.J., for appellant Lorillard, Inc.

Donald J. Cohn (argued), James V. Kearney, Webster & Sheffield, New York City, Alan S. Naar, Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein, Woodbridge, N.J., for appellant Liggett Group, Inc.

Before GIBBONS, Chief Judge, BECKER and NYGAARD, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

I. INTRODUCTION

This appeal is from a final judgment in a protracted products liability case in which the plaintiff, Antonio Cipollone, seeks to hold Liggett Group, Inc., Lorillard, Inc., and Philip Morris, Inc., three of the leading firms in the tobacco industry, liable for the death from lung cancer of his wife, Rose Cipollone, who smoked cigarettes from 1942 until her death in 1984. Jurisdiction is founded on diversity of citizenship, 28 U.S.C. § 1332, and New Jersey law applies. In an earlier opinion in the case, *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987), we held that the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), 15 U.S.C. §§ 1331-1340 (1982 & Supp. II 1984), which became

effective January 1, 1966, preempted claims arising from smoking after January 1, 1966 (hereinafter post-1965) based upon the cigarette companies' advertising or promotion of cigarettes or upon the adequacy of their warnings as to the hazards of smoking.

Following that opinion, which stemmed from an interlocutory appeal, *see* 28 U.S.C. § 1292(b), the case proceeded to a four-month long trial. At the conclusion of the trial, the jury, answering a series of special interrogatories, returned a verdict in the sum of $400,000.00 for the plaintiff in his individual capacity on the breach of express warranty claim. The jury also found the defendants strictly liable for failing to warn adequately of the hazards of their products, but returned a verdict in their favor on that claim because of Mrs. Cipollone's comparative fault. More precisely, the jury apportioned 80% of the responsibility for Mrs. Cipollone's injuries to her because of its finding that she knew and appreciated the damages of cigarette smoking and voluntarily chose to smoke.

Both sides have appealed, raising a plethora of issues. The prime defendant is Liggett Group, Inc. ("Liggett"), whose cigarettes Mrs. Cipollone smoked from 1942 to 1968. The briefs focus primarily on alleged errors in the district court's charge to the jury and on specific jury findings that may have preclusive effect. Considerable attention was also devoted to ancillary issues: the viability of the plaintiff's generic risk-utility theory of liability (the district court granted summary judgment for the defendants thereon); the failure of the district court to award plaintiff prejudgment interest; the district court's grant to plaintiff of partial summary judgment on defendants' statute of limitations defense; and the effect of our preemption decision on plaintiff's intentional tort claims (the district court held them to be preempted).

Appendix A

The most problematic issue on this appeal lies in the skewing effect on the trial of our interlocutory preemption decision, which created an artificial (although legally binding) time constraint on the determination of causation and liability. Under the aegis of that decision, the jury was forbidden to consider the effect of the defendants' post-1965 conduct and, concomitantly, could only consider whether a pre-1966 breach of warranty and failure to warn was the proximate cause of Mrs. Cipollone's smoking and death. However, the district court allowed the jury to consider Mrs. Cipollone's post-1965 smoking, on the theory that her post-1965 behavior was relevant to a comparative fault defense.

We conclude that the district court erred in permitting the jury to make a comparative fault determination based on Mrs. Cipollone's post-1965 behavior. Rather, the jury should have been instructed that Mrs. Cipollone's post-1965 conduct bore only on the apportionment of damages, but not on her comparative fault for her own injuries. Although in some respects the fairest and most natural approach would be to let the jury consider both sides' post-1965 conduct to the extent that it bears on apportionment of damages, that result would impermissibly impinge on the immunity from suit afforded the cigarette companies by the Labeling Act. Still, permitting the defendants to take advantage of Mrs. Cipollone's post-1965 conduct to escape liability altogether, particularly in the face of plaintiff's allegations that defendants engaged in post-1965 conduct designed to reassure smokers, creates an unacceptable imbalance.

The only way to give effect to our preemption decision and yet ensure fairness in the trial is to limit the evidence going to Mrs. Cipollone's comparative fault to her pre-1966 conduct. We find this result to be consistent with, and indeed compelled by, the New Jersey Supreme Court decision in *Ostrowski v. Azzara*,

Appendix A

111 N.J. 429, 545 A.2d 148 (1988). Thus, Mr. Cipollone is entitled to a new trial on his failure to warn claim.

Liggett's appeal on the express warranty claim presents an abstruse question about the nature of the reliance interest required by U.C.C. section 2-313, N.J.S.A. § 12A:2-313. The attention we pay to this issue on appeal is somewhat ironic, given that the extensive trial focused on other theories of liability, particularly strict liability. The jury's verdict for the plaintiff on an express warranty theory makes our analysis necessary, however.

We conclude that the express warranty charge was flawed and that that portion of the verdict must also be set aside. Primarily, the district court erred to the extent that it prevented Liggett from proving, by a preponderance of the evidence, that Mrs. Cipollone did not believe the advertisements. The advertisements constitute an express warranty as long as they constitute a basis of the bargain, that is, as long as Mr. Cipollone can prove that Mrs. Cipollone was aware of the advertisements and as long as Liggett does not prove that she disbelieved them.

We conclude that the district court did not err in barring a comparative fault defense to the express warranty claim because, on the facts of this case, it would have been impossible for Mrs. Cipollone to have known of the dangers of smoking and still have believed enough in Liggett's advertisements for them to constitute a warranty. In essence, the comparative fault issue collapses into the basis of the bargain issue. We further conclude that the district court did not err in denying Liggett's motion for judgment n.o.v., because there was sufficient evidence in the record to support conclusions that a warranty existed and was breached and that breach of that warranty proximately caused Mrs. Cipollone's cancer.

Appendix A

We reverse the district court's grant of summary judgment to defendants on plaintiff's generic risk-utility claim. Although our holding on this issue is subject to instant modification by the New Jersey Supreme Court, which presently has the issue before it, we find that the district court improperly granted defendant's motion for a directed verdict. Thus, plaintiff still has live claims against all three defendants in this case; although Mrs. Cipollone did not smoke cigarettes made by Lorillard and Philip Morris until after 1965 (hence absolving them from liability on the breach of express warranty and failure to warn claims), they remain potentially liable on the risk-utility claim, which does not implicate advertising, promotion or warnings. We also conclude that if Mr. Cipollone prevails on an express warranty claim on retrial, he is entitled to prejudgment interest. We reverse the district court's grant of partial summary judgment for the plaintiff on the statute of limitations issue because we conclude that there was a genuine issue of material fact as to whether, within the meaning of the New Jersey discovery rule, Mrs. Cipollone should have discovered the facts giving rise to her claim earlier. Finally, we agree with the district court that plaintiff's intentional tort claim is preempted by our previous decision.

II. THE RELEVANT FACTS ADDUCED AT TRIAL

Rose Cipollone was born in 1925 and began to smoke in 1942. She smoked Chesterfield brand cigarettes, manufactured by Liggett, until 1955. In her deposition, introduced into evidence at the trial, she stated that she smoked the Chesterfield brand to be "glamorous," to "imitate" the "pretty girls and movie stars" depicted in Chesterfield adverstisements, and because the advertisements stated that Chesterfield cigarettes were "mild." Mrs. Cipollone stated that she understood the description of Chesterfield cigarettes as "mild" to mean that the cigarettes were safe.

Appendix A

Mrs. Cipollone also testified that she was an avid reader of a variety of magazines, frequently listened to the radio, and often watched television during the years that she smoked the Chesterfield brand. Although she could not specifically remember which Chesterfield advertisements she saw or heard during those years, Chesterfield advertisements appeared continuously in those media during that period. Several of these advertisements were introduced into evidence. The following copy appeared commonly in Chesterfield magazine advertisements during the year 1952:

> PLAY SAFE Smoke Chesterfield.
>
> NOSE, THROAT, and Accessory Organs not Adversely Affected by Smoking Chesterfields. First such report ever published about any cigarette. A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes. A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields—10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each. At the beginning and at the end of the six-months period each smoker was given a thorough examination, including X-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears and throat. The medical specialist, after a thorough examination of every member of the group, stated: "It is my opinion that the ears, nose,

Appendix A

> throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-month period by smoking the cigarettes provided."

5 J.A. 21, 22 (c. 1952).[1] The defendants stipulated that Mrs. Cipollone had seen many of these advertisements.

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1. Chesterfield magazine advertisements during this period also contained the following messages:

> Chesterfield contains only ingredients that give you the Best Possible Smoke—as tested and approved by scientists from leading universities.

5 J.A. 21 (c. 1952).

> [Chesterfield cigarettes contain) PURE, COSTLY MOISTENING proved by over 40 years of continuous use in U.S.A. tobacco products as *entirely safe for use in the mouth*—chemically pure, far most costly glycerol and pure sugars which are natural to tobacco—*nothing else*. . . . Scientists from Leading Universitites *Make Sure* that Chesterfield Contains Only Ingredients that Give You the Best Possible Smoke.

5 J.A. 26 (c.1952).

> *AND NOW*—CHESTERFIELD FIRST TO GIVE YOU SCIENTIFIC FACTS IN SUPPORT OF SMOKING. A responsible consulting organization reports a study by a competent medical specialist and staff on the effects of smoking Chesterfields. For six months a group of men and women smoked only Chesterfield—10 to 40 day—their normal amount. 45 percent of the group have smoked Chesterfield from one to thirty years for an average of ten years each.

(Cont'd)

Appendix A

Television advertisements for the Chesterfield brand were also introduced into evidence. The Chesterfield cigarette was described as having "ingredients that make Chesterfield the best possible smoke as tested and approved by scientists from leading universities," 5 J.A. 37 (undated), and being manufactured with "electronic miracle" technology that makes "cigarettes . . . more better [sic] and safer for you." 5 J.A. 39 (c. 1955). One advertisement stated "[n]ow Chesterfield is the first cigarette to present this scientific evidence on the effects of smoking—a medical specialist making regular bi-monthly examinations of group of people from various walks of life—45% of this group have smoked Chesterfield's for an average of over 10 years—after 8 months, the medical specialist reports that he observed no adverse effects to the nose, throat and sinuses of the group who were smoking Chesterfield. I'd say that means real mildness." 5 J.A. 36 (undated).

Mrs. Cipollone testified that she frequently listened to the radio show "Arthur Godfrey and His Friends," sponsored by the Chesterfield brand. The Chesterfield brand was marketed on the show as follows (text read by Mr. Godfrey):

(Cont'd)

> At the beginning and end of the six-months, each smoker was given a thorough examination including X-rays, and covering the sinuses, nose, ears and throat. After these examinations, the medical specialist stated . . . "It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-months period by smoking the cigarettes provided."

5 J.A. 23 (c. 1952).

Appendix A

[Y]ou saw me read this last week but a lot of folks didn't and it's a very important message—especially those of you who smoke Chesterfields—you probably been wonderin' about this. You hear stuff all the time about "cigarettes are harmful to you" this and that and the other thing. . . .

Here's an ad, you've seen it in the papers—please read it when you get it. If you smoke it will make you feel better, really.

"Nose, throat and accessory organs not adversely affected by smoking Chesterfield. This is the first such report ever published about any cigarette. A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes.

"A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields—10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each.

"At the beginning and at the end of the six months period each smoker was given a thorough examination, including X-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears and throat."

Appendix A

Now—here's the important thing. "The medical specialist, after a thorough examination of every member of the group, stated: 'It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-months period by smoking the Chesterfield cigarettes provided.' "

Now that ought to make you feel better if you've had any worries at all about it. I never did. I smoke two or three packs of these things every day. I feel pretty good. I don't know, I never did believe they did you any harm and now, we've got the proof. So—Chesterfields are the cigarette for you to smoke, be they regular size or king-size.

5 J.A. 156 (Sept. 24, 1952).[2]

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2. Many similar Arthur Godfrey advertisements were also introduced into evidence, including the following three:

> You know you hear all this applesauce about—you'd better quit smoking, pal, or you won't be here long and stuff.
>
> Listen to this. [At this point Mr. Godfrey told his listeners about the same "medical" study that he had related on September 24.]
>
> There's the story. Were not adversely affected. Chesterfield is the right—[now addressing Tony Marvin, the announcer] Will you hold that over there for me?—Chesterfield—you've been smoking 'em, gosh, Tony, how many do you smoke a day?

(Cont'd)

Appendix A

In 1955, Mrs. Cipollone stopped smoking Chesterfield

(Cont'd)

[Mr. Marvin]: I run about 2½ packs a day, Arthur.

[Mr. Godfrey]: 2½ packs a day. If he wasn't so tight, he'd smoke 3. LAUGHTER. They're wonderful cigarettes, in either size, you know, king-size, this size here, or the regular size, they're the same tobacco. Go ahead and smok'em and enjoy'em, they're wonderful.

5 J.A. 158 (Oct. 1, 1952).

[I have] a client here, the Chesterfield people, Liggett and Myers are their names. [T]he firm . . . is an honorable one, a trustworthy one. For years and years and years that they have been advertising, you never heard them make an unsubstantiated claim—ever! Certainly, not during the time that I've been with 'em. They came out, not so long ago, with a report by an eminent physician—it's a good report—I suppose there are those who wonder about it.

If you believe in me, and over the 23 years I've been in the radio, you know that I have never yet misled you with advertising. Nobody has been able to buy me enough to do that. If you believe in me, then you take my work that I know this—that the Liggett and Myers people don't make statements that they can't substantiate. And when they say that after this test that they made with the doctor, that after he made it, he comes up and say, quote—'It is my opinion that the ears, nose, throat, and accessory organs of all participating subjects examined by me, were not adversely affected in the six-months period by smoking the cigarettes provided.'

And they mean what they say—that specialist said it. Liggett and Myers have substantiated it. Remember that when

(Cont'd)

Appendix A

cigarettes and began to smoke L & M filter cigarettes, also made by Liggett. In response to a question as to why she switched to the L & M brand, Mrs. Cipollone stated that "[w]ell, they were talking about the filter tip, that it was milder and a miracle it would keep the stuff inside a trap, whatever." When asked why

(Cont'd)

you're wondering about cigarettes. Smoke Chesterfields—they're good.

5 J.A. 161 (Nov. 5, 1952).

[A] medical specialist is making . . . examinations . . . every two months. Now they're gone, I think, as far as 8 months. That's so far, 8 months. What they did was get a group of people from various walks of life. . . . And 45% of this group smoked Chesterfields for an average of over 10 years. After 8 months, the medical specialist reports he has observed no adverse effects whatever on the noses, the throat, the sinuses, the ears, or other organs from smoking Chesterfields.

That's—that seems to me to [mean] mildness, real mildness. You've been wondering about whether or not smoking does things to you which you don't want to do? Well, why don't you smoke Chesterfields. Here's a guy watchin' a lot of people and nothin' happened to them yet. We've been smokin 'em a long time. Of course, we were always this way.

You can't judge by us. But they're good, very fine, and I never recall seein' on anybody's gravestone—He Smoked Too Much, did you? I never did. So Chesterfield's for you, regular or king size.

5 J.A. 171 (Jan. 8, 1953).

she desired the filter tip, she testified that "it was the new thing and I figured, well, go along [,and that] it was better [because t]he bad stuff would stay in the filter then." When asked whether concern about the "bad stuff" was due to a concern about her health, she stated "[n]ot really. . . . It was the trend. Everybody was smoking the filter cigarettes and I changed, too."

She also stated that although she could not remember any specific advertisements, she did "recall the ads and . . . remember the tips [and] the messages of a filter, a safer, something to that effect. . . . That it would filter the nicotine and the tar and the tobacco[, and t]hat it would be a cleaner and fresher smoke." Mrs. Cipollone also stated that she "recall[ed] seeing an ad that said doctors recommend you smoke . . . I think it was L & M's. . . . [T]hrough advertising, I was led to assume that they were safe and they wouldn't harm me. . . There was lots of advertising. There was advertising everywhere. There was advertising in magazines, on billboards, in newspapers."

Mr. Cipollone also introduced evidence as to how the L & M brand was marketed during the years that Mrs. Cipollone smoked that brand. One series of advertisements that appeared on television and in magazines at the outset of L & M's introduction to the public stated that L & M "miracle tip" filters were "just what the doctor ordered!"; the "just what the doctor ordered" phrase often appeared in a large bold typescript in magazine advertisements as "remov[ing] the heavy particles, leaving you a Light and Mild smoke."

In 1968, Mrs. Cipollone stopped smoking the L & M brand and started smoking the Virginia Slims brand, manufactured by Philip Morris. She stated that she switched "because it was very glamorous and very attractive ads and it was a nice looking

cigarette. That persuaded me." In the 1970's, Mrs. Cipollone switched to the Parliament brand, also manufactured by Philip Morris. She testified that this brand was advertised as having a "recessed" filter and that she thought that this made it healthier. In 1974, she changed from the Parliament to the True brand, a cigarette manufactured by Lorillard, Inc. ("Lorillard") and advertised as low tar, upon the advice of her doctor, who had told her son to stop smoking.

From 1942 until the early 1980's, Mrs. Cipollone smoked between one pack and two packs of cigarettes per day. The only exception to this pattern was that, at the urging of her husband, Mrs. Cipollone substantially reduced her smoking during her first pregnancy in the 1940's. In 1981, Mrs. Cipollone was diagnosed as having lung cancer, but even though her doctors advised her to stop smoking, she was unable to do so. Mrs. Cipollone continued to smoke until June of 1982 when her lung was removed. Even after that, she smoked occasionally, in secret. She testified that she was "addicted" to cigarette smoking and that it was terribly difficult for her to give it up. She stopped smoking in 1983 after her cancer had spread widely and she had become terminally ill. Mrs. Cipollone died on October 21, 1984.

Evidence was also introduced on the subject of Mrs. Cipollone's awareness of the health consequences of smoking cigarettes. Some of that evidence has already been alluded to: she switched to the L & M brand in part because she thought that brand safer than the Chesterfield brand, and she later switched to the Parliament and True brands out of concern for her health. In addition, from the beginning of the Cipollones' marriage in 1947, Mr. Cipollone repeatedly told his wife that she should stop smoking because it was unladylike and bad for her health. When reports linking smoking with cancer and heart disease began to

appear in the media, Mr. Cipollone repeatedly brought them to his wife's attention. Other members of the Cipollone family also told her that cigarette smoking was dangerous to her health and could cause cancer. After January 1, 1966, every package of cigarettes purchased by Mrs. Cipollone bore the Congressionally mandated warning labels.

There is also evidence that Mrs. Cipollone feared that her cigarette smoking would damage her health. When she developed a bad cough, her concern about the possible effect of smoking on her health led her, apparently prior to 1966, to make novenas to Saint Jude asking his intercession on her behalf to prevent her from developing cancer. There is also evidence, however, that Mrs. Cipollone disbelieved the reports linking cigarette smoking to cancer and other health problems. As explained above, there is evidence that she read the cigarette companies' advertisements, understood them as representing that the cigarettes were safe, and thus, as she put it "was led to assume that [the cigarettes that I purchased] wouldn't harm me." She stated that she had often read cigarette company or Tobacco Institute statements, reported in articles about the health consequences of smoking or reproduced in advertisements, stating that the link between smoking and disease has not been proven. She also testified that because she found it so difficult to stop smoking, she "[m]aybe . . . didn't want to believe" the reports that she heard that smoking caused cancer or other diseases and that she "didn't believe" that her smoking would cause her to contract lung cancer. In addition, Mrs. Cipollone stated that she believed that "[t]obacco companies wouldn't do anything that was really going to kill you."

III. PROCEDURAL HISTORY

On August 1, 1983, Mr. and Mrs. Cipollone filed a complaint

in the district court for the District of New Jersey, founded on diversity of citizenship, seeking damages against Liggett, Philip Morris and Lorillard for the suffering and monetary loses resulting from Mrs. Cipollone's lung cancer. The complaint alleged that the lung cancer resulted from Mrs. Cipollone's smoking of cigarettes manufactured by the named defendants.

On May 31, 1985, following Mrs. Cipollone's death, and suing in his capacity as Mrs. Cipollone's executor and on his own behalf, Mr. Cipollone filed a third amended complaint, upon which the case was tried. The third amended complaint included damages claims against each defendant based on the following theories of liability:[3]

1. Strict liability in tort (and negligence) on the theory that the defendants' failed to warn adequately (or negligently failed to warn adequately) of the health effects of smoking ("the failure to warn claim");

2. Strict liability in tort on the theory that the defendants marketed defectively designed cigarettes rather than alternatively designed, safer cigarettes ("the design defect claim");

3. Strict liability in tort on the theory that the health risks of the defendants' cigarettes exceeded their social utility ("the generic risk-utility claim");

4. Breach of express warranty regarding the health effects of smoking ("the express warranty claim");

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3. The third amended complaint contained 14 counts; we have therefore summarized the salient points.

5. Fraud and misrepresentation in the advertising and promotion of cigarettes from 1940 to 1983 ("the fraudulent misrepresentation claim");

6. Conspiracy to defraud the public regarding the health effects of smoking ("the conspiracy to defraud claim");

The defendants moved for summary judgment on the ground that the plaintiff's claims were preempted by the Federal Cigarette Labeling and Advertising Act, Pub.L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1340 (1982 & Supp. II 1984)), a statute enacted in 1965 in the wake of the Surgeon General's historic report on the hazards of cigarette smoking. The Act required health warnings, as set forth in the statute and subsequently strengthened by statutory amendments, to be placed on cigarette packages. The effective date of the statute was January 1, 1966. *See* Pub.L. No. 89-92, § 11, 79 Stat. at 284.

The district court held that the statute did not have preemptive effect, but certified the preemption question for interlocutory review by this court pursuant to 28 U.S.C. § 1292(b) (1982). We assumed jurisdiction over the appeal and concluded that the Act impliedly preempted some of the plaintiff's claims, holding as follows:

> [T]he Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. . . . [W]here the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers

> in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

789 F.2d at 187 (footnote omitted). We remanded the case to the district court so that it might determine which claims were preempted.

The district court interpreted our decision as preempting the plaintiff's failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud claims to the extent that they sought to challenge the defendants' advertising, promotional and public relations activities after January 1, 1966. *See* 649 F.Supp. 664, 669, 673-75 (D.N.J.1986). Because Mrs. Cipollone did not smoke cigarettes manufactured by Philip Morris or Lorillard before January 1, 1966, the district court granted judgment on the pleadings on the failure to warn and express warranty claims as to those defendants. However, the district court held that the plaintiff's design defect and risk-utility claims were not preempted. *See id.* at 669-72.

In another pretrial ruling, the district court struck the plaintiff's generic risk-utility claim on the ground that it was barred through the retroactive application of the New Jersey Products Liability Act, 1987 N.J.Sess.Law Serv. ch. 197, 188-93 (West) (codified at N.J.S.A. §§ 2A:58C-1 to -7 (West 1987)). *See* Dist.Ct.Op. 1-6 (Oct. 27, 1987).

After five years of discovery and numerous pretrial motions, the case proceeded to trial on plaintiff's failure to warn, design defect, express warranty, fraudulent misrepresentation, and conspiracy claims, and on defendants' comparative fault and statute of limitations defenses. On April 21, 1988, at the close

of plaintiff's proofs, the district court struck the design defect claim on the ground that plaintiff had failed to present sufficient evidence that defendants' failure to market an alternatively designed cigarette when it became feasible to do so in the mid-1970s was a proximate cause of Mrs. Cipollone's illness and death. *See* 683 F.Supp. 1487, 1493-95 (D.N.J.1988). This ruling has not been challenged on appeal.

As a result of the district court's rulings, jury deliberations were limited to the fraudulent misrepresentation claim against each defendant, the conspiracy to defraud claim against each defendant, the failure to warn claim against Liggett, and the express warranty claim against Liggett. The district court also took the defendants' statute of limitations defense from the jury by granting partial summary judgment for the plaintiff on this issue. *See* Dist.Ct.Op. (Dec. 21, 1987).

After a four-month trial, the jury deliberated for four and one half days and returned its verdict in the form of answers to special interrogatories. *See* Fed.R.Civ.P. 49(a). The interrogatories and the jury's answers are as follows:

1. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation or concealment by defendant Liggett, prior to 1966, of material facts concerning significant health risks associated with cigarette smoking?

Yes
No X

2. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation by defendant Philip Morris, prior to 1966, of material facts concerning significant health risks

associated with cigarette smoking?

Yes
No X

3. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation by defendant Lorillard, prior to 1966, of material facts concerning significant health risks associated with cigarette smoking?

Yes
No X

4. Was there a conspiracy prior to 1966 to fraudulently misrepresent and/or conceal material facts concerning significant health risks associated with cigarette smoking?

Yes
No X

5. If you answered "yes" to question #4, were any of the defendants members of that conspiracy?

Liggett Group, Inc.	Yes	No
Philip Morris Incorporated	Yes	No
Lorillard, Inc.	Yes	No

6. If you answered "yes" to question number 5, has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation or concealment, prior to 1966, by any member of the conspiracy?

Appendix A

Yes
No

7. Should Liggett, prior to 1966, have warned consumers regarding health risks of smoking?

Yes X
No

8. If you answered "yes" to question 7, was that failure to warn prior to 1966 a proximate cause of all or some of Mrs. Cipollone's smoking?

Yes X
No

9. If you answered "yes" to question 8, was such smoking a proximate cause of Mrs. Cipollone's lung cancer and death?

Yes X
No

10. If you answered "yes" to question 9, did Mrs. Cipollone voluntarily and unreasonably encounter a known danger by smoking cigarettes?

Yes X
No

11. If you answered "yes" to question 10, was this conduct by Mrs. Cipollone a proximate cause of her lung cancer and death?

Yes X
No

Appendix A

12. If you answered "yes" to question 11, what is the percentage of responsibility for Mrs. Cipollone's injuries attributable to each of the following parties:

Mrs. Cipollone	80%
Liggett Group, Inc.	20%

[NOTE: The sum of these precentages must equal 100%].

13. Did Liggett make express warranties to consumers regarding the health aspects of its cigarettes?

Yes X
No

14. If you answered "yes" to question 13, did any Liggett products used by Mrs. Cipollone breach that warranty?

Yes X
No

15. If you answered "yes" to question 14, was Mrs. Cipollone's use of these products a proximate cause of her lung cancer and death?

Yes X
No

16. If you answered "yes" to any of the following questions: 1, 2, 3, 6, 9 or 15, what damages did Mrs. Cipollone sustain?

$ none

Appendix A

17. If you answered "yes" to any of the following questions: 1, 2, 3, 6, 9, or 15, what damages did Mr. Cipollone sustain?

$400,000

18. If you answered "yes" to any of the following questions: 1, 2, 3, 6, or 9, is plaintiff entitled to punitive damages against one or more of the defendants?

Yes
No X

19. If you answered "yes" to question 18, to what amount is plaintiff entitled?

$

20. If you awarded a sum under question 19, what amount of this total is attributable to each of the following parties?

Liggett Group, Inc.	$
Philip Morris Incorporated	$
Lorillard, Inc.	$

[NOTE: these amounts should add up to the total awarded under question 19.]

As the answers to the interrogatories indicate, the jury rejected the fraudulent misrepresentation claims and the conspiracy to defraud claims against all defendants. As to the failure to warn claim against Liggett, the jury concluded that Liggett breached its duty to warn of the health hazards of smoking before 1966, that this breach was a proximate cause of Mrs. Cipollone's

Appendix A

smoking, and that Mrs. Cipollone's smoking was a proximate cause of her death. No damages were awarded on the failure to warn claim, however, because New Jersey's comparative fault law bars a plaintiff from recovering damages if she is more than 50% at fault for the injury, and the jury found that Mrs. Cipollone "voluntarily and unreasonably encounter[ed] a known danger by smoking cigarettes" and in so doing bore 80% of the responsibility for her injuries. As to the express warranty claim, the jury found that Liggett had breached an express warranty made to consumers. The jury awarded Mr. Cipollone $400,000 to compensate him for damages that he sustained from Liggett's breach of warranty; the jury awarded Mrs. Cipollone's estate no damages on the breach of warranty claim.

On June 29, 1988, the plaintiff moved for a new trial on the limited issue of Mrs. Cipollone's damages and to amend the judgment to include prejudgment interest pursuant to New Jersey Rule 4:42-11(b). On July 1, 1988, Liggett moved for judgment n.o.v. and, in the alternative, for a new trial on account of alleged error in the district court's jury instructions on express warranty and its special interrogatories. On August 24, 1988, the district court denied all of the post-trial motions. *See* 693 F.Supp. 208 (D.N.J.1988). The defendants and Mr. Cipollone filed timely notices of appeal.

In its appeal, Liggett contends that the district court made the following prejudicial errors in its jury instructions: (1) it failed to instruct the jury that Mrs. Cipollone's nonreliance on the Liggett advertisements would preclude her recovery on the express warranty claim; (2) it failed to the instruct the jury that a buyer's actual knowledge of a warranty-breaching condition bars recovery on an express warranty claim under the doctrine of assumption of risk or contributory fault; and (3) it erroneously instructed

the jury in several respects on the failure to warn claim, most significantly by failing to impose a but-for causation requirement.

Liggett also contends that the district court erred in failing to grant its motion for judgment n.o.v. on the express warranty claim on the grounds that (1) the jury's finding that Mrs. Cipollone "voluntarily and unreasonably encounter[ed] a known danger by smoking cigarettes" established lack of proximate causation as a matter of law; (2) the plaintiff offered no evidence that Mrs. Cipollone's lung cancer was proximately caused by any claimed breach of express warranty; and (3) the evidence cannot support a finding that any Liggett advertisement made a warranty covering health effects in the future from forty years of smoking. Liggett also contends that the district court erred by granting plaintiff partial summary judgment on defendant's affirmative defenses based on the statute of limitations.

In his appeal, Mr. Cipollone contends that (1) the district court's jury charge and interrogatories on the failure to warn issue erroneously and unfairly allowed the jury to consider Mrs. Cipollone's post-1965 smoking in determining her percentage of comparative fault; (2) the district court erred in applying the New Jersey Products Liability Act to strike the risk-utility claim; (3) the district court's refusal to award prejudgment interest contravenes New Jersey Court Rule 4:42-11(b); and (4) the district court erred in applying our preemption decision to the intentional tort claims (i.e. the fraudulent misrepresentation and conspiracy to defraud claims). Mr. Cipollone also announced that if the verdict in his favor on the breach of express warranty claim and his contention that he is entitled to prejudgment interest were upheld, he would not press his other contentions.

In its protective cross-appeal, Philip Morris contends that

Mr. Cipollone's intentional tort claims are preempted, and that, in any event, these claims are mooted by the jury's findings. In its protective cross-appeal, Lorillard asserts that, in view of Mr. Cipollone's concession that he would be satisfied to accept the breach of express warranty verdict plus prejudgment interest, our assumption of jurisdiction over Mr. Cipollone's appeal relative to the claims against it and Philip Morris would violate the "case or controversy" requirement of Article III of the United States Constitution.[4] Lorillard also contends that the intentional tort claims are preempted by the Labeling Act.

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4. We find this contention to be without even colorable merit and dispose of it summarily. Unlike the plaintiffs in *Granfied v. Catholic University of America*, 530 F.2d 1035 (D.C.Cir.), *cert. denied*, 429 U.S. 821, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976), we think that there is no question regarding Mr. Cipollone's "wholehearted contrariety," 530 F.2d at 1045, to the defendants' position. Neither do we find applicable the mootness concerns motivating the decision in *In re Coordinated Pretrial Proceedings in Petroleum Products, Antitrust Litigation*, 830 F.2d 198 (Emerg.Ct.App.), *cert. denied*, 484 U.S.969, 108 S.Ct. 466, 98 L.Ed.2d 405 (1987). In *Petroleum Products*, a pending decision before the Ninth Circuit—over which the Emergency Court of Appeals had no control—might have mooted, as a matter of law, the proceedings before, or decision of, that court. *See id.* at 202-04. Here, by contrast, we address the intentional tort claims simultaneously with our rejection of Mr. Cipollone's position on the express warranty claim. Thus, we have no reason to believe that Mr. Cipollone's position lacks, or will lack, "wholehearted contrariety" to Lorillard's on the intentional tort claims. Moreover, the fact that plaintiff is willing to settle for less than he might get does not mean that his position is not contrary to the defendants. For all of these reasons, we have no problem finding a case or controversy under Article III.

Appendix A

IV. SHOULD MRS. CIPOLLONE'S POST-1965 CONDUCT HAVE BEEN CONSIDERED IN DECIDING HER COMPARATIVE FAULT ON THE FAILURE TO WARN CLAIM?[5]

The New Jersey Comparative Fault Act, N.J.S.A. 2A:15-5.1, states that:

> Contributory negligence shall not bar recovery in an action by any person . . . to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought . . . . Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

The Comparative Fault Act can apply to strict liability actions if the plaintiff's conduct can be found to constitute contributory negligence. *See Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 164, 406 A.2d 140, 147 (1979). Thus, if Mrs. Cipollone were more that 50% responsible for her own smoking, as the jury found her to be, plaintiff would be barred from recovering under his failure to warn claim. As we have noted, the interplay between New Jersey's comparative fault scheme and the preemptive effect of the Labeling Act produced an anomalous situation at trial. The district court did not distinguish between Mrs. Cipollone's pre-1966 and post-1965 conduct when instructing the jury to consider the degree to which she was at fault pursuant to New

5. Although Mr. Cipollone was prepared to forego pursuit of this claim in the event that his breach of express warranty verdict was upheld, that has not happened. *See infra* Part VI.

Appendix A

Jersey comparative fault law.[6]

The wording of special verdict interrogatories 10, 11, and 12 was to the same effect,[7] permitting the jury to consider Mrs.

6. The district court instructed the jury as follows:

> Defendant, Liggett, has the burden to prove by a preponderance of the believable evidence that Rose Cipollone had a complete understanding and appreciation of the nature and extent of the health risks of cigarette smoking, and further that her use of cigarettes was voluntary and unreasonable. . . .
>
> In determining whether Rose Cipollone should be held responsible for her injuries, you must consider the cigarettes which Rose Cipollone smoked and the health risks which they have alleged to have. If you have determined that the use of those cigarettes involved any significant health risk, you must then decide whether Rose Cipollone had knowledge and appreciation of those risks and, having such knowledge and appreciation, voluntarily and unreasonably proceeded to encounter those risks by smoking cigarettes and by failing to quit smoking. . .
>
> If you decide that by continuing to smoke Rose Cipollone voluntarily and unreasonably encountered a known risk, you must then decide whether that conduct was a proximate cause of Rose Cipollone's injuries. However, if you find that she did not do so voluntarily or acted reasonably then defendants have not met their burden as to this defense.

2 J.A. 108-10.

7. Interrogatory 10 asked whether "Mrs. Cipollone voluntarily and unreasonably encounter[ed] a known danger by smoking cigarettes." Interrogatory 11 aked whether "this conduct by Mrs. Cipollone [was] a proximate cause of her lung cancer and death." Interrogatory 12 asked the jury to apportion responsibility between Mrs. Cipollone and Liggett based upon its answers to the preceding questions 10 and 11. *See supra* at 554.

Appendix A

Cipollone's fault to the extent it believed that she acted unreasonably in continuing to smoke after 1965. However, the court instructed the jury not to consider Liggett's post-1965 conduct. Mr. Cipollone contends that the jury instructions were inconsistent with *Ostrowski v. Azzara,* 111 N.J. 429, 545 A.2d 148 (1988), in which the New Jersey Supreme Court held that once a legal wrong has occurred, plaintiff's conduct after that time bears only on mitigation of damages (even if some of plaintiff's injuries have not yet manifested themselves). Such conduct does not, however, bear on whether plaintiff's comparative fault falls above or below the 50% threshold.

Mr. Cipollone also contends that the district court's jury instructions were asymmetrical and unfair because they permitted the jury to use Mrs. Cipollone's post-1965 conduct to bar her claim even though the post-1965 marketing practices of the defendant were free from scrutiny. He points out that the jury was required to bar Mrs. Cipollone's failure to warn claim in its entirety if it believed that she was 80% responsible for her injury in light of her smoking from 1942 to 1983 even if it believed that Liggett's failure to warn was, for example, 67% responsible for Mrs. Cipollone's smoking from 1942 to 1966.

Because the facts and reasoning of *Ostrowski* are so important to our resolution of the issue of Mrs. Cipollone's post-1965 conduct, we recount them in some detail. Mrs. Ostrowski was a patient whose diabetes, poor diet, and cigarette smoking caused her to have severe blood circulation problems. She went to her podiatrist to complain of soreness in her left toe. After several visits, and after considering her representation (which proved to be false) that she had seen her internist regarding her diet and insulin dosage, the podiatrist recommended that the toe nail on the sore toe be removed to allow drainage. After the surgery,

Appendix A

the plaintiff continued to smoke, despite advice that she should stop (because smoking greatly increases the blood circulation problems caused by diabetes). Several weeks after the surgery, it became clear that the blood flow to the toe was insufficient to heal the toe; the plaintiff was left with a non-healing, pre-gangrenous wound. Mrs. Ostrowski had to undergo three different by-pass surgeries to increase blood circulation to the toe. The last operation involved a vein transplant from one leg to another.

Mrs. Ostrowski sued the podiatrist, contending that the podiatrist was negligent in her initial decision to remove the toe nail, that the toe nail should not have been removed, and that her subsequent problems with her leg were proximately caused by the podiatrist's negligence. The podiatrist contended that the plaintiff was at fault in both her pre-surgery and post-surgery conduct and that this conduct contributed to her injuries. The jury found that the podiatrist had acted negligently in removing the plaintiff's toenail but found that plaintiff's fault, based on both her pre- and post-surgery conduct, exceeded that of the podiatrist (51% to 49%). The plaintiff's recovery was therefore barred by the trial court under New Jersey comparative fault law because her fault exceeded 50%.

The Appellate Division of the Superior Court affirmed, but the Supreme Court of New Jersey reversed. Because the podiatrist's negligence was in performing the toe surgery, the Court conceptualized the plaintiff's behavior after treatment had begun but before the toe surgery as relevant to comparative fault. However, the Court concluded that her post-surgery behavior was relevant only to avoidable consequences.[8] On remand, the jury

8. Avoidable consequences is the name given to the damage that plaintiff causes to herself by breaching her duty to mitigate damages.

was instructed to arrive at two percentage figures regarding plaintiff's conduct: first, the degree to which her conduct after treatment had begun was responsible for the toe surgery, and second, the degree to which her conduct after treatment had begun—considering her conduct both before and after the toe surgery—was responsible for her ultimate injury, the bypass surgery. If the first percentage (the plaintiff's fault for the toe surgery) was less than the physician's fault for the toe surgery, the plaintiff would recover. Her recovery, however, would be offset by the second percentage times the damages suffered (which reflects plaintiff's total responsibility for her ultimate injury).[9] If the first percentage was greater than the physician's fault for the surgery, plaintiff's recovery would be barred by the Comparative Fault Act.

The Court distinguished between the plaintiff's conduct before and after the toe surgery on the ground that "[a]voidable consequences . . . come[ ] into action when the injured party's carelessness occurs *after* the defendant's legal wrong has been committed" but "[c]ontributory negligence . . . comes into action when the injured party's carelessness occurs *before* defendant's wrong has been committed or concurrently with it." 111 N.J. at

9. An example may help to clarify. Suppose the jury finds that the plaintiff suffered $100,000 in damages from the bypass surgery. Suppose also the jury finds that, after plaintiff had begun treatment with the podiatrist, her conduct before the toe surgery was 10% responsible for her ultimate injury (the first percentage), but that her conduct before and after the toe surgery combined were 80% responsible (the second percentage). Thus the podiatrist's conduct (before the toe surgery) must have been 20% responsible for the ultimate injury. On these facts, even though the plaintiff's total conduct was more responsible for her injury than the podiatrist's (80% versus 20%), she would recover, because her conduct *before the toe surgery* was less responsible for her ultimate injury than the podiatrist's conduct during that time (10% versus 20%). However, her ultimate recovery would be only $20,000 (because the podiatrist was only 20% responsible for the ultimate injury).

438, 545 A.2d at 152.[10] In explaining why it thought that the jury should arrive at two percentages to measure plaintiff's fault, the Court reasoned that "it would be the bitterest irony if the rule of comparative negligence, designed to ameliorate the harshness of contributory negligence, should serve to shut out any recovery to one who would otherwise have recovered under the law of contributory negligence [because her contributory conduct was relevant to avoidable consequences rather than contributory negligence]." *Id.* at 441-42, 545 A.2d at 154.

The court held that the plaintiff's conduct before treatment had begun was irrelevant to both the comparative fault and avoidable consequence injuries, under the doctrine that the " 'defendant "must take the plaintiff as he finds him." ' " *Id.* at 438, 545 A.2d at 152 (citation omitted). Nevertheless, the Court made clear that the plaintiff's conduct before treatment had begun was not totally irrelevant to the case: that conduct was relevant to determining what damages were a proximate result of the defendant's negligence, because, as we have noted, some of the damage to the plaintiff's leg could have been caused not by the defendant's negligence but by the plaintiff's pre-treatment condition. *See id.* at 448, 545 A.2d at 157.[11]

10. The Court noted, however, that this timeline approach to dividing the plaintiff's conduct into that relevant to contributory fault and that relevant to avoidable consequences will not work in every case. *See* 111 N.J. at 438 n. 2, 545 A.2d at 152 n. 2 (citing *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357 (1988), which found that failure to use a seat belt, although not a cause of the automobile accident that resulted in injury, was a cause of avoidable consequences).

11. The Court also noted that "it is often difficult to determine how much of the plaintiff's injury is due to the preexisting condition and how much the

(Cont'd)

Appendix A

We agree with Mr. Cipollone's contention that it is appropriate to conceptualize our preemption decision as imposing an automatic cut-off date for imposition of liability. We further agree with Mr. Cipollone that, in light of the preemption decision, the doctrines set out in *Ostrowski* should have been applied in this case. As Liggett emphasizes throughout its brief, its post-1965 marketing practices could not form the basis for any tort or warranty claim as a matter of law; hence, Liggett's arguably tortious conduct was completed as of January 1, 1966. Therefore, Mrs. Cipollone's post-1965 conduct should have been considered as relevant to avoidable consequences, possibly reducing her damages but not foreclosing liability.

We reject Liggett's contention that "application of plaintiff's interpretation of *Ostrowski* would require this court to hold that the case overruled the New Jersey Supreme Court's [product liability] decisions in *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Maiorino v. Weco Products Co.*, 45 N.J. 570, 214 A.2d 18 (1965) and *Cintrone v. Hertz Truck Leasing*, 45 N.J. 434, 212 A.2d 769 (1965)." Liggett's Br. at 43 n. 50. Liggett's argument apparently is that the instant case is no different from the typical toxic tort case in which there may be a significant interval between the time of defendant's wrongful act (the sale of or exposure to the defective product) and the time plaintiff's injury from use of the product manifests itself. Therefore, according to Liggett, all of the plaintiff's pre-injury conduct should bear on comparative fault. Our preemption decision renders this analogy inapposite, however. In the more

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aggravation is caused by the defendant" and that the defendant should bear the burden of separating the two so that any damage not separable is borne by the defendant. 111 N.J. at 439, 545 A.2d at 152.

Appendix A

typical case, the jury considers all of the defendant's pre-injury conduct also. Because that cannot happen here, we find it unfair and impermissible for the jury to consider Mrs. Cipollone's comparative fault during the period (1966-1981) for which Liggett's conduct is unjudgable.

We have no way of knowing how much of the 80% fault that the jury ascribed to Mrs. Cipollone is attributable to her pre-1966 smoking and how much to her post-1965 smoking. The judgment entered on the jury verdict in Liggett's favor on the failure to warn claim must therefore be reversed (the error is obviously not harmless) and the case remanded for new trial on that issue.

We do not dispute Liggett's contention that we could analyze the case differently. However, we believe that the artificial cut-off so skews the normal balance that only the *Ostrowski* avoidable consequences analysis can mitigate the unfairness and disruption to state tort law wrought by our preemption decision. We acknowledge that the retrial must proceed, to some extent, with an artificial distinction between conduct before and after January 1, 1966, and that the expert witnesses will face a difficult task on allocating the consequence of pre-1966 and post-1965 conduct. However, that result is forced upon us by the circumstances. This will not be the first time, nor the last, that a legal construct will have constrained a trial. We are confident that the extremely able lawyers and the distinguished trial judge in whose hands this case rests will do justice.

On retrial, the jury should be asked whether Liggett's pre-1966

failure to warn caused Mrs. Cipollone to smoke cigarettes.[12] The jury must consider the relative degrees to which Mrs. Cipollone and Liggett were at fault for Mrs. Cipollone's pre-1966 smoking. If Mrs. Cipollone is thought to have been more than 50% at fault than Liggett for her pre-1966 smoking, then the failure to warn claim ends there, and Mrs. Cipollone's recovery is barred on that claim. If, however, the jury finds that Mrs. Cipollone's pre-1966 fault for her smoking is 50% or less (and that that smoking was a proximate cause of her cancer), the jury must then consider the issue of avoidable consequences, considering Mrs. Cipollone's conduct both before and after January 1, 1966. The jury may not evaluate the propriety of the defendant's cigarette marketing practices after 1965,because the defendants have been absolved from liability for otherwise tortious and unfair marketing practices by the Labeling Act.

V. DID THE DISTRICT COURT OTHERWISE ERR IN INSTRUCTING THE JURY ON THE FAILURE TO WARN CLAIM?

Liggett contests several facets of the district court's jury charge on the failure to warn claim. Had the verdict on the failure to warn claim not been set aside on the grounds set forth in Part IV, we would have had to address these arguments in connection with Liggett's contention that the jury's answers to interrogatories 7, 8 and 9, in which it found that Liggett's failure to warn was a proximate cause of Mrs. Cipollone's injuries, should be set aside. We nonetheless discuss most of these issues because they are

12. As is indicated by the jury's answer to special interrogatory number 7, Liggett owed a duty to warn consumers of the health effects of smoking prior to 1966. This issue should not be re-tried; the existence of this duty has been properly established. *See infra* at 560.

important for a proper retrial.

First, Liggett contends that it was under no duty to warn of the dangers of cigarettes because their dangers were commonly understood. We find that there is no basis for so holding as a matter of law, and that as a matter of fact the jury found otherwise.[13]

Liggett next argues that (1) the district court erred in instructing the jury on Liggett's duty to disclose the results of its scientific tests and (2) the district court's use of the word "obviousness" confused the jury. We find both of these contentions to be without merit. Under New Jersey law, Liggett had a duty to conduct research, and to disclose significant dangers discovered as a result of that research. *See Feldman v. Lederle Laboratories,* 97 N.J. 429, 453-55, 479 A.2d 374, 386-88 (1984). Moreover, there was nothing confusing about the district court's use of the word "obvious." The jury had no reason to think that it might be deciding an "open and obvious" danger case, *see, e.g., Shaffer v. AMF, Inc.,* 842 F.2d 893 (6th Cir.1988), and therefore it could not have been prejudicially confused.[14]

13. The district court's charge instructed the jury to:

> consider the extent to which ordinary consumers prior to 1966 were aware that cigarette smoking posed significant health risks. . . The obviousness of a product's danger—as measured by such general consumer knowledge, not by a particular plaintiff's knowledge—is one element to be considered in order for you to determine whether a duty to warn exists.

2 J.A. 105-06.

14. Liggett also contends that the factors listed by the district court as relevant to determining whether a duty to warn exists were superfluous and prejudicial. We find this argument to be frivolous.

Appendix A

Liggett's more substantial contention has to do with the district court's instruction on causation, which defines proximate cause[15] as follows:

> a cause which necessarily set the other causes in motion and was a substantial contributing factor in bringing about the injury. Proximate cause is defined as a cause which naturally and probably led to and might have been expected to produce the result complained of.

2 J.A. 91-92. The district court also instructed the jury that "there may be two or more concurrent and directly cooperative and efficient proximate causes of an injury" if the defendant was "a substantial contributing factor" in the plaintiff's injuries. 2 J.A. 93.

It is not exactly clear what fault Liggett finds with this instruction. Liggett claims that: "Plaintiff was required to prove that 'but for' Liggett's claimed failure to warn Mrs. Cipollone would not have been injured—that had Liggett provided a warning prior to 1966 Mrs. Cipollone would have quit smoking or never started smoking, and by doing so, Mrs. Cipollone would have avoided lung cancer in 1981." Liggett Br. at 50. There are three possible interpretations of Liggett's objection.

First, Liggett may be arguing that, even if plaintiff proves by a preponderance of the evidence that the totality of Liggett's

15. As the district court carefully instructed, this case involves two distinct causal inquiries: first, whether Liggett's violation of legal norms caused Mrs. Cipollone to smoke, and second, whether the cigarettes that Mrs. Cipollone smoked as a result of Liggett's violations proximately caused her cancer.

Appendix A

violation of legal norms—its failure to warn and breach of warranty—was a "but for" cause of Mrs. Cipollone's lung cancer, the jury could not find for the plaintiff with respect to any individual Liggett violation unless the plaintiff demonstrated by a preponderance of the evidence that that individual violation caused Mrs. Cipollone's lung cancer. This bifurcation of Mr. Cipollone's lawsuit into two independent claims might allow Liggett to escape liability for the totality of its wrongful conduct. We find this argument untenable.

As a substantive matter, Liggett is liable if its behavior proximately caused Mrs. Cippolone's cancer. For pleading purposes, Mr. Cipollone divided Liggett's conduct up into different pre-established legal categories, i.e. a tort-based failure to warn claim and a contract-based express warranty claim. Although the elements of proof necessary to prove liability under these two legal theories differ, the procedural pleading and proof requirements do not transform Mr. Cipollone's allegations into two completely different lawsuits. Thus, Mr. Cipollone does not have to prove that each legal violation proximately caused his wife's cancer. He need only prove that the totality of Liggett's wrongful behavior, which as doctrinal matter is divided into a tort and contract claim, proximately caused her cancer.

Second, Liggett may be arguing that Mrs. Cipollone's conduct would have caused her cancer no matter what Liggett did, and that therefore Liggett's conduct cannot be considered the cause of Mrs. Cipollone's injury. This argument is plainly inconsistent with the established jurisprudence of concurrent causation. The "substantial factor" test has traditionally been used in concurrent cause cases, i.e. cases in which there are two or more causes each

of which is sufficient to cause the injury.[16] *See* Keeton et al., *Prosser and Keeton on The Law of Torts* 266-68 (5th ed. 1984). Our preemption decision makes this case quite comparable to a concurrent cause situation. Liggett's pre-1966 behavior might have been enough, by itself, to cause Mrs. Cipollone's cancer, and its post-1965 behavior might also have been enough to cause the cancer. Thus, just as it is unfair to let one tortfeasor completely escape liability for his fire merely because another tortfeasor caused another fire, so it is unfair to let Liggett completely escape liability for its pre-1966 behavior merely because its post-1965 behavior (or that of its codefendants), which was immunized from scrutiny at the trial, might also have caused enough damage, by itself, to kill her.

Third, Liggett may be arguing that Mr. Cipollone had to prove, to a greater certainty than the district court's instruction required, that Liggett's failure to warn caused her injuries. Under this theory, the fact that the defendant's conduct might have been a substantial factor in causing Mrs. Cipollone's cancer would not be enough; rather, Mr. Cipollone would have had to prove, by a preponderance of the evidence, that if Liggett had not breached its warranty and if it had warned consumers of the dangers of smoking, Mrs. Cipollone would not have contracted cancer. In other words, Liggett argues that plaintiff had to prove that "but

16. For example, two fires merge and the combined fire destroys the plaintiff's property, although either fire would have done so alone. *See Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 146 Minn. 430, 179 N.W. 45 (1920). In such a case, one has to assign responsibility to either fire or no liability would be assigned because each defendant could prove, individually, that plaintiff's property would have been destroyed even if he had acted non-tortiously. Thus, liability is assigned even though each defendant's conduct could be seen as irrelevant to the ultimate outcome.

for" Liggett's conduct, the injury would not have occurred.[17] We find this argument to be inconsistent with New Jersey law.

Liggett cites *Campos v. Firestone Tire and Rubber Co.*, 98 N.J. 198, 485 A.2d 305 (1984), which it claims rejected the substantial factor test and instead require a "but for" test in failure to warn situations. In *Campos*, the New Jersey Supreme Court

17. Some decisions and commentators have used statistics to elaborate on the meaning of "but for" causation, *see, e.g., In re Agent Orange Prod. Liab. Litig.*, 597 F.Supp. 740, 833-42 (E.D.N.Y. 1984), Orloff, *Theories of Cancer and Rules of Causation*, 27 Jurimetrics 255 (Spring 1987). This approach defines "but for" causation as at least a 50% chance that the defendant's conduct caused the injury in question. It is not clear to us that this is the instruction that Liggett is requesting. Nor is it clear to us that this is the only way to define "but for" causation. The leading hornbook on Torts states that "[the] question of [causation in] 'fact' is one upon which all the learning, literature and lore of the law are largely lost. It is a matter upon which lay opinion is quite as competent as that of the most experienced court. For that reason, in the ordinary case, it is peculiarly a question for the jury." Keeton, et al., *Prosser and Keeton on The Law of Torts* 264-65 (5th ed. 1984). By seeking to define causation more numerically (i.e., at least 50% probability), the statistics-oriented commentators may be advocating a substantive change that New Jersey would not endorse. We are not convinced that when a jury determines that "but for" a defendant's conduct, the injury would not have occurred, it is determining that the chances of that injury being the result of defendant's conduct are 50% or greater. Traditionally, jury instructions have been in words, not numbers. *Prosser and Keeton* seems to suggest that a jury's determination of causation defies numerical analysis, and New Jersey may want to keep it that way. Thus, with some trepidation, but with considerable support, we offer the following discussion of causation without an airtight definition of what "but for" causation is. For purposes of the discussion, it is sufficient that the reader recognize that a "but for" test requires more direct linkage between defendant's conduct and the injury than does the "substantial factor" instruction given by the district court. *See also* Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U.Chi.L.Rev. 69, 84-91 (1975).

found that the plaintiff had the burden of proving that a proper warning would have prevented the injury caused by a tire assembly explosion. The plaintiff was arguably aware of the need to protect himself by keeping the tire in a safety cage, but he reached into the cage and was injured when the assembly exploded. The court quoted with approval from an article by Dean Keeton:

> If the basis for recovery under strict liability is inadequacy of warnings or instruction about dangers, then plaintiff would be required to show that an adequate warning or instruction would have prevented the harm.[18]

However, the court in *Campos* did not reverse the jury's verdict for the plaintiff. Instead, it remanded noting that "there may be some question whether plaintiff sustained his burden of proving causation, *see Brown v. United States Stove Co.*, [98 N.J. 155, 484 A.2d 1234 (1984)]." *Campos*, 98 N.J. at 211, 485 A.2d at 312. *Brown* seems to endorse a substantial factor test: "a tortfeasor will be held answerable if its 'negligent conduct was a substantial factor in bringing about the injuries.' " *Brown*, 98 N.J. at 171, 484 A.2d at 1243 (citations omitted). Thus, although the language quoted from Deen Keeton's article in *Campos* suggests that New Jersey might endorse a "but for" test in failure to warn cases, the citation to *Brown* indicates to the contrary. Subsequent New Jersey cases interpreting *Campos* also indicate to the contrary.

In *Hull v. Getty Refining & Marketing Co.*, 202 N.J.Super.

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18. Keeton, *Products Liability—Inadequacy of Information*, 48 Tex.L.Rev. 398, 414 (1979).

461, 467, 495 A.2d 445, 448 (App.Div.1985), and *Vallillo v. Muskin Corp.*, 212 N.J.Super. 155, 159-60, 514 A.2d 528, 530 (App.Div.1986), the New Jersey Superior Court cited *Campos* to support a substantial factor test. Determining proximate causation requires determining "whether [the] breach of a duty enforceable within strict product liability against any defendant constituted a substantial factor in the causation of plaintiff's accident." *Hull*, 202 N.J.Super. at 467, 495 A.2d at 448. Describing why it was overturning a plaintiff's verdict (not remanding, as the court did in *Campos* "[a] jury could have determined that the lack of a proper warning to rely on the cage's protection and to keep his arm out of the cage was at least a factor materially contributing to the happening of the accident." 212 N.J.Super. at 160, 514 A.2d at 530. In the case at bar, a jury could determine that Liggett's violations constituted a factor materially contributing to her injury.

New Jersey has also used the substantial factor test in nonfeasance situations. In *Evers v. Dollinger*, 95 N.J. 399, 471 A.2d 405 (1984), the New Jersey Supreme Court held that it was error to enter judgment for a doctor who failed to operate on a tumor for seven months. The court reasoned that, although the doctor's conduct did not cause the cancer, the seven-month delay could have been a substantial factor in causing the condition from which the plaintiff eventually suffered. In *Hake v. Manchester Township*, 98 N.J. 302, 486 A.2d 836 (1985), the same court held that plaintiff could establish causation in a wrongful death action by showing that defendant's negligent conduct negated a substantial possibility that plaintiff might have been saved after attempting to kill himself. Neither of these was a concurrent causation case and in neither case would defendant's conduct by itself have caused the injury. Yet, each defendant's conduct substantially increased the probability of the plaintiff's

injury. In such situations the New Jersey courts have allowed recovery.

In light of these cases, we conclude that the district court did not erroneously instruct the jury as to the proximate cause requirement in Mr. Cipollone's failure to warn claim. The district court should again give a "substantial factor" charge on retrial.[19]

VI. DID THE DISTRICT COURT ERR IN FAILING TO INSTRUCT THE JURY THAT MRS. CIPOLLONE'S NONRELIANCE ON LIGGETT'S SAFETY ADVERTISEMENTS WOULD PREVENT HER FROM RECOVERING ON HER EXPRESS WARRANTY CLAIM?

We turn now to another major area of dispute between the parties, one that implicates the conceptual basis of express warranty law. Mr. Cipollone brought his express warranty claim under U.C.C. § 2-313(1), which provides:

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19. We note that, notwithstanding our preemption decision, if plaintiff argues an addiction theory, a jury might be able to consider Mrs. Cipollone's post-1965 smoking as well as her pre-1966 smoking for purposes of determining whether Liggett's tortious conduct caused Mrs. Cipollone's injury. If the jury believes that Liggett's pre-1966 conduct proximately caused Mrs. Cipollone to smoke cigarettes pre-1966 and that Mrs. Cipollone became addicted as a result of that smoking, then those post-1965 cigarettes smoked as a result of the addiction should be considered in discerning whether Liggett's conduct proximately caused Mrs. Cipollone's lung cancer. The Surgeon General has recently concluded that "[s]cientists in the field of drug addiction now agree that nicotine, the principal pharmacologic agent that is common to all forms of tobacco, is a powerfully addicting drug." U.S. Dep't Health & Human Serv., *The Health Consequences of Smoking: Nicotine Addiction—A Report of the Surgeon General* (1988)—.

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes *part of the basis of the bargain* creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made *part of the basis of the bargain* creates an express warranty that the goods shall conform to the description.

N.J.S.A. § 12A:2-313(1) (emphases added). With respect to this issue, the district court gave the following instructions to the jury:

> [P]laintiff must prove . . . that Liggett, prior to 1966, made one or more of the statements claimed by the plaintiff and that such statements were affimations of fact or promises by Liggett . . . [and] that such statements were part of the basis of the bargain between Liggett and consumers like Rose Cipollone . . . .
>
> The law does not require plaintiff to show that Rose Cipollone specifically relied on Liggett's warranties.
>
> Ordinarily a guarantee or promise in an advertisement or other description of the goods becomes part of the basis of the bargain if it would naturally induce the purchase of the product and no particular reliance by the buyer on such statement needs to be shown. However, if the

> evidence establishes that the claimed statement cannot fairly be viewed as entering into the bargain, that is, that the statement would not naturally induce the purchase of a product, then no express warranty has been created.

4 J.A. at 232-34.

Liggett contends that this interpretation of "part of the basis of the bargain" is flawed because the jury should also have been instructed that Mrs. Cipollone's nonreliance on the advertisements would preclude those advertisements from becoming "part of the basis of the bargain." Liggett argues that the express warranty verdict must therefore be set aside. Although our interpretation of the precise meaning of "reliance" differs somewhat from Liggett's, we agree.[20]

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20. Initially, we emphasize that a representation made by a seller is not an express warranty if it is made in such a manner that both the seller and the buyer should understand to be a representation upon which the buyer will not rely. "[A]ll descriptions by merchants must be read against the applicable trade usages. . . ." N.J.S.A. § 12A:2-313 U.C.C. Comment 5. A representation made in a manner that is generally recognized not to be a basis upon which purchasers make a decision to purchase goods cannot be a warranty when read against "applicable trade usages." This requirement is in accord with the traditional common law "puffing" exception in the law of contracts. *See* H. Hunter, *Modern Law of Contracts: Breach and Remedies* ¶4.02[3], at 4-7 to 4-8 (1986 & Supp.1989). But Liggett has not contended, and we do not think it could, that its advertisements to consumers are generally recognized as not forming the basis upon which cigarette purchasing decisions are made. If such were the case, Liggett would not have spent millions of dollars on advertising.

A.

Authority on the question whether reliance is a necessary element of section 2-313 is divided. Although a few courts have held that reliance is not a necessary element of section 2-313,[21] the more common view has been that it is, and that either a buyer must prove reliance in order to recover on an express warranty or the seller must be permitted to rebut a presumption of reliance in order to preclude recovery.[22] Some treatise writers support this interpretation.[23] No New Jersey court or panel of this court has squarely addressed the question.[24]

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21. *See, e.g., Winston Indus., Inc. v. Stuyvesant Ins. Co.*, 317 So.2d 493 (Civ.App.Ala.) (purchaser permitted to sue under § 2-313 for breach of a warranty that he never received), *cert. denied*, 294 Ala. 775, 317 So.2d 500 (1975).

22. *See, e.g., Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983) ("Absence of reliance will negate the existence of an express warranty."); *Scaringe v. Holstein*, 103 A.D.2d 880, 477 N.Y.S.2d 903 (1984) (notice that shift did not work demonstrated that plaintiff could not have relied on an alleged warranty that the used car was in "excellent condition"); *Indust-Ri-Chem Lab., Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 293 (Tex.Ct.App.1980) ("Obviously, if the buyer knows that a representation of the seller is untrue, that representation cannot be a part of the basis of the bargain.").

23. *See, e.g.*, 1 J. White & R. Summers, *Uniform Commercial Code* § 9-5, at 448, 455 (3d ed. 1988); W. Hawkland, *Uniform Commercial Code Series* § 2-313:05, at 299-300 (1983 & Supp.1987). Professor White has written an amicus brief on this issue, consistent with his treatise position, on behalf of Lorillard, Philip Morris, R.J. Reynolds, American Tobacco Co. and Brown & Williamson Tobacco Co.

24. In their briefs, the parties discuss five New Jersey and Third Circuit cases: *Jackson v. Muhlenberg Hospital*, 96 N.J.Super. 314, 232 A.2d 879 (Law

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Appendix A

The history of section 2-313(1)(a), although informative, fails

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Div.1967), *rev'd on other grounds*, 53 N.J. 138, 249 A.2d 65 (1969) (per curiam); *Collins v. Uniroyal, Inc.*, 126 N.J.Super. 401, 315 A.2d 30 (App. Div.1973) (per curiam), *aff'd*, 64 N.J. 260, 315 A.2d 16 (1974) (per curiam); *Gladden v. Cadillac Motor Car Division*, 83 N.J. 320, 416 A.2d 394 (1980); *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir.1965); and *Henry Heide, Inc. v. WRH Products Co.*, 766 F.2d 105 (3d Cir.1985). We discuss *Gladden* and *Pritchard* in the text. *See infra* at 566. We do not find the other cases to be particularly helpful.

In *Jackson*, the Superior Court held that a hospital patient who contracted hepatitis from infected blood supplied by a blood bank could sue the blood bank for its breach of express warranty to the hospital. Mr. Cipollone stresses the sentence stating that "the patient . . . probably never saw the label [constituting the warranty] on the container of blood [that infected her]." 96 N.J.Super. at 330, 232 A.2d at 888. The case, however, is inapposite because the patient in that case was suing not under section 2-313 but under N.J.S.A. § 12A:2-318, which permits third party beneficiaries to sue for breach of express warranty. *Jackson* did not say that the *hospital's* reliance was irrelevant, yet that is the operative question. That a third party beneficiary may sue for breach of express warranty even if she did not rely on the affirmation of fact does not imply that the affirmation would constitute a warranty even if the buyer had not relied on it.

In *Collins*, the Superior Court held that a tire manufacturer's effort to limit a breach of express warranty remedy to replacement of the tires was unconscionable and hence unenforceable. The limitation on remedy was contained in a written warranty that also guaranteed the tires against "road hazards." The court did not discuss the meaning of "the basis of the bargain" but focused on the unconscionability of the remedy limitation. The Superior Court deemed one of the tire manufacturer's advertisements relevant to the case, in part because "the advertisement helped to explain the scope and intent of the 'road hazard' part of the warranty." 126 N.J.Super. at 408, 315 A.2d at 34.

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Appendix A

to give a clear answer as to whether reliance is required. Section

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Mr. Cipollone contends that *Collins* supports his position that reliance is not an element of section 2-313 because the court never discussed whether the buyer relied on the written warranty; the court merely stated that "[t]he warranty . . . was given to [the buyer] at the time he bought the tires." *Id.* at 405, 315 A.2d at 33. Despite Mr. Cipollone's request, we decline to base our decision on the New Jersey Superior Court's failure to discuss an issue.

Liggett contends that *Collins* supports its position because the Superior Court, immediately before its discussion about the advertisements stated that "[t]he jury could have inferred . . . that [the buyer had] relied" on the advertisement. *Id.* at 408, 315 A.2d at 34. We hesitate to place too much weight on this remark for three reasons.

First, as noted above, the Superior Court did not discuss the relevance of the buyer's reliance, it merely noted that the jury could have inferred that the buyer had relied and then continued with its discussion in a new sentence that began, "More importantly, the advertisement helped to explain the scope and intent of the 'road hazard' part of the warranty. . . ." *Id.*

Second, the issue in *Collins* that the Superior Court discussed was whether the remedy limitation was unconscionable; that the buyer's reliance on an advertisement making broad claims about the safety of the product was thought relevant to the issue of unconscionability does not necessarily imply that the buyer's nonreliance on a reasonable advertisement would have precluded the advertisement from becoming part of the manufacturer's express warranty.

Third, the New Jersey Supreme Court in its short per curiam opinion affirming the Superior Court further muddied the waters. In a statement obliquely favorable to Mr. Cipollone's position, the Supreme Court addressed the issue in terms of what would be "the natural reliance and the reasonable expectation of the purchaser flowing from the warranty," 64 N.J. at 263, 315 A.2d at 18, thus suggesting, as Mr. Cipollone argues, that the significant factor is what a purchaser would reasonably infer from the affirmation of fact or promise rather than what the purchaser in the case-at-bar actually inferred, and hence

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2-313(1)(a) is an adaption of section 12 of the Uniform Sales Act.[25] A comparison of the two sections reveals that they are

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relied on. However, the Supreme Court also discussed what "the purchaser of a tire buying it *because*" of the warranty would think, *id.* (emphasis added), hence suggesting that reliance had some role to play in discerning whether the warranty was unconscionable.

In light of all of these offsetting considerations, we do not believe that *Collins* is helpful in analyzing the issue before us.

In *Heide*, the issue was whether a chemical company's specification sheet, which listed several physical properties of the company's plastic, constituted an express warranty. This court analyzed the issue as follows:

> The facts as stipulated show that the . . . sheet was not the basis of any bargain between [the chemical company and the manufacturer. The chemical company] gave no express warranty in this case that the [plastic] would conform to the . . . sheet, and thus [the plaintiff] cannot be the beneficiary of any such warranty.

766 F.2d at 112. The court did not say why it was holding that the sheet did not constitute an express warranty. The word "reliance" enters the opinion only through a recital of the chemical company's contention. *Id.* We therefore glean little guidance from *Heide*.

25. Section 12 of the Sales Act provides:

> Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

substantially the same except for the replacement of section 12's express reliance requirement with section 2-313(1)(a)'s basis of the bargain requirement. The district court reasoned that the omission of the word "reliance from section 2-313(1)(a), in light of section 12's use of that word, implied that reliance was no longer an element of express warranties. *See* 693 F.Supp. at 213. Liggett contends that "if U.C.C. § 2-313 wrought the radical change in New Jersey warranty law that the trial court has read into it," then "[o]ne would think that the New Jersey Study Comments would have at least made reference to it." Liggett Br. at 19. We note in this regard that the New Jersey Study Comment One to section 12A:2-313 states that "[t]his section of the Code is comparable to Section 12 of the Sales Act (N.J.S.A. 46:30-18), except that it characterized the warranties of sample and description as express warranties." There is no reference to the reliance issue.

Liggett argues that reliance must have some place in the "basis of the bargain" determination. Thus, even if reliance should be assumed, based on what "would reasonably induce the purchase of a product," a defendant must have the opportunity to prove non-reliance. The position finds some support in the U.C.C. comments. U.C.C. Official Comment 3 states:

> In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, *any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.* The issue normally is one of fact. (Emphasis added.)

Moreover, comment 8 states that "all of the statements of the seller [become part of the basis of the bargain] *unless good reason is shown to the contrary.*" (Emphasis added.) The plain language of these comments supports Liggett's opposition, at least to the extent it indicates that a defendant must be given some opportunity to show that the seller's statements were not meant to be part of the basis of the bargain.

This court has interpreted comment 3 before, in another tobacco case, *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir.1965) (applying Pennsylvania law). In a footnote to a concurring opinion, Judge Freedman stated the following:

> The comment by the drafters of the [U.C.C.] make it clear that what was formerly described as reliance [under § 12 of the Uniform Sales Act] is now absorbed as a factor which is made a basis of the bargain. Comment 3 to § 2-313 states that where a statement is made *during a bargain* no particular evidence of reliance need be shown, but that it remains a question of fact whether evidence introduced by the defendant is sufficient to show non-reliance.

350 F.2d at 41 n. 7 (Freedman, J., concurring).[26] *Pritchard* therefore reads the last sentence in comment 3 ("[A]ny fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.") as qualifying the sentence that precedes it ("[N]o particular reliance need be shown.") In other

26. The court explicitly noted that Judge Freedman's concurrence represented "the majority view on the question of reliance," *Pritchard*, 350 F.2d at 487.

words, even though "no particular reliance need be shown," the seller can "take [an] affirmation . . . out of the agreement" by showing that the buyer did not rely.

This interpretation of comment 3 appears consistent with that of the New Jersey Supreme Court. In *Gladden v. Cadillac Motor Car Division*, 83 N.J. 320, 416 A.2d 394 (1980), the Court held that a manufacturer's attempted limitation of its damages for breach of its express warranty could be given no effect in light of the "linguistic maze" of the warranty. *See id.* at 333, 416 A.2d at 401. The Court cited Comment 3, stating that "[p]articular reliance on such statements of description or quality need not be shown." *Id.* at 325, 416 A.2d at 396. The Court thus expressly rejected the view that the plaintiff has the burden of proving reliance on the seller's affirmation of fact, promise or description. Nonetheless, the statement that "particular reliance need not be shown," made in the context of a discussion about Comment 3, does not imply that a defendant cannot defeat a warranty claim by showing that the affirmation of fact, promise or description was not part of the basis of the bargain. We believe that *Gladden* states not that reliance is irrelevant, but only that the *plaintiff* need not prove reliance.

A final argument in support of a reliance requirement is found in the amicus brief. Without a reliance requirement, one runs the risk of draining the term "basis of the bargain" of all meaning, because the buyer's subjective state of mind becomes completely irrelevant. The district court instructed the jury that a statement could be considered part of the basis of the bargain if it "would naturally induce the purchase of the products." This instruction is completely objective and would permit a buyer to sue for breach of express warranty even if the seller's warranties were advertisements made in another state or country, and even if the

buyer did not hear of the claims in these advertisements until the day that she walked into an attorney's office to bring suit for personal injury. It strains the language to say that a statement is part of the "basis" of the buyer's "bargain," when that buyer had no knowledge of the statement's existence.

The above arguments notwithstanding, it is possible to read the "basis of the bargain" requirement as requiring some subjective inducement of the buyer, without requiring a reliance finding. Requiring that the buyer *rely* on an advertisement, whether by imposing this burden initially on the buyer bringing suit, or by allowing the seller to rebut a presumption of reliance, puts a heavy burden on the buyer—a burden that is arguably inconsistent with the U.C.C. as a whole, with other comments to section 2-313 in particular, and with several commentators' suggestions in this area.[27]

The reliance requirement does not comport well with U.C.C. Official Comment 7 to section 2-313. Comment 7 states that "[i]f language is used after the closing of the deal . . . the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order . . . ." N.J.S.A. § 12A:2-313 U.C.C. Comment 7. If a post-closing promise—on which, by definition, a seller cannot rely in deciding

27. *See, e.g.*, Shanker, *The Seller's Contractual Obligation Under U.C.C. 2-313 to Tell the Truth*, 38 Case W.Res.L.Rev. 40 (1987-88); Heckman, *"Reliance" or "Common Honesty of Speech": The History and Interpretation of Section 2-313 of the Uniform Commercial Code*, 38 Case W.Res.L.Rev. 1 (1987-88); Coffey, *Creating Express Warranties Under the U.C.C.: Basis of the Bargain—Don't Rely on It*, 20 U.C.C.L.J. 115 (1987); Lewis, *Toward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations*, 47 Ohio St.L.J. 671 (1986).

to make a purchase—can create a warranty, then it is difficult to see why a pre-closing promise can create a warranty only if relied upon.

Additionally, a reliance requirement seems inconsistent with U.C.C. Official Comment 4 to section 2-313. Comment 4 states that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." N.J.S.A. § 12A:2-313 U.C.C. Comment 4. Reliance is irrelevant to what a seller agrees to sell.[28]

In light of these seemingly inconsistent mandates on the reliance question, some might argue that it is foolish to try to reconcile what is patently inconsistent. We reject this suggestion however, because we find it feasible to reconcile the competing arguments, and we believe that the New Jersey Supreme Court would want us to try. We believe that the most reasonable construction of section 2-313 is neither Liggett's reliance theory, which fails to explain how reliance can be relevant to "what a seller agreed to sell," or the district court's purely objective theory,

28. For example, imagine a tire merchant describing a tire to three different prospective purchasers, each listening to his sales talk at the same time. The seller guarantees that the tire will (1) be safe for use even in heavily loaded vehicles; (2) last at least 20,000 miles; and (3) be the same style tire sold with a Rolls Royce. The first purchaser buys the tire relying on the seller's safety warranty. The second buys the tire relying on the seller's durability warranty. The third buys the tire relying on the seller's style warranty. None of the purchasers communicates to the seller the reason why he or she is purchasing one of the tires, although the reason for the purchase is communicated to the buyer's spouse, who will later come forward to testify truthfully regarding what the buyer relied on when making the purchase. It is implausible that each buyer has a different warranty, and that the second buyer, but not the first or third buyers, can sue if the tire wears out before 20,000 miles.

which fails to explain how an advertisement that a buyer never even saw becomes part of the "basis of the bargain." Instead, we believe that the New Jersey Supreme Court would hold that a plaintiff effectuates the "basis of the bargain" requirement of section 2-313 by proving that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise.[29] Such proof will suffice "to weave" the affirmation of fact or promise "into the fabric of the agreement," U.C.C. Comment 3, and thus make it part of the basis of the bargain.[30] We hold that once the buyer has become aware of the affirmation of fact or promise, the statements are presumed to be part of the "basis of the bargain" unless the defendant, by "clear affirmative proof," shows that the buyer knew that the affirmation of fact or promise was untrue. We believe that by allowing a defendant to come forward with proof that the plaintiff did not believe in the warranty,[31] we are reconciling, as the New Jersey Supreme Court

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29. The burden that we place on the plaintiff stems in part from the fact that this case involves neither a written warranty delivered to the purchaser in connection with a sale nor an oral affirmation of fact or promise made to the purchaser in person by the seller. In both of those situations there is no question that the plaintiff has knowledge that the alleged warranty exists.

30. This interpretation of section 2-313 is also consistent with decisions of courts that have held that section 2-313 does "not . . . require a strong showing of reliance." *Sessa v. Riegle*, 427 F.Supp. 760, 766 (E.D.Pa.1977), *aff'd*, 568 F.2d 770 (3d Cir.1978). Because the district court's decision in *Sessa* was affirmed by judgment order, and not by a reported opinion, the decision is not binding precedent on this Court. *See* Third Circuit IOP Chapter 8C.

31. If the defendant proves that the buyer did not believe in the warranty, the plaintiff should then be given the opportunity to show that the buyer nonetheless relied on the warranty. It is possible to disbelieve, but still rely on, the existence of a warranty. In this sense, the buyer can "buy" a lawsuit. Thus,

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would want us to, the U.C.C. comments, the U.C.C. case law, and traditional contract principles, which serve as the background rules to the U.C.C.[32]

As indicated above, Comment 4 and Comment 7, as well as the largely dominant objective theory of contracts, militate

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if the buyer disbelieved the warranty, but could prove that she was relying on it when she bought the product for stipulated damages—for example, a refund—or economic damages—the difference between "the value of the goods accepted and the value of the goods would have had if they had been warranted," U.C.C. § 2-714. Such a buyer could not recover consequential damages, however. She would be barred by both U.C.C. § 2-715 ("[I]f [the injured person] discover[s] the defect prior to his use, the injury would not proximately result from the breach of warranty."), and traditional contract principles, under which a buyer has a duty to mitigate damages and cannot recover for damages that she "could have avoided without undue risk, expense or humiliation," *Restatement (Second) of Contracts* § 350(1) (1965).

Other courts have noticed the distinction between knowledge and reliance as well. *See Royal Business Machines v. Lorraine Corp.*, 633 F.2d 34, 44 (7th Cir.1980) ("The situation of the parties, their knowledge *and* reliance, may be expected to change . . . . " (emphasis added)). We emphasize that we are not adopting Liggett's rebuttable presumption of reliance theory. Reliance only comes into play if, after the defendant has proved non-belief, the plaintiff then tries to prove reliance despite non-belief, the burden is on the plaintiff to prove reliance despite non-belief and if she meets that burden she can collect economic damages.

32. N.J.S.A. 12A:1-103 states:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions.

in favor of interpretation of express warranty that ignores the buyer's subjective state of mind. Under the extreme version of this theory apparently adopted by the district court, all the buyer should have to show is what the seller agreed to sell. In other words, an express warranty would be created when a seller makes statements to the public at large that would induce a reasonable buyer to purchase the product, even if the actual buyer never heard those statements." We find this result untenable, however. First, as mentioned above, this interpretation drains all substantive meaning from the phrase "basis of the bargain," and would allow a seller to collect even if that seller was unaware of the warranty until she walked into her attorney's office to file suit. Second, this interpretation is difficult, if not impossible, to square with other comments to the U.C.C. As discussed above, Comment 3 states that "no particular reliance on such statements need be shown . . . . Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof." Comment 8 states that "all of the statements of the seller [become part of the basis of the bargain] unless good reason is shown to the contrary." Clearly, both Comment 3 and Comment 8 envision some mechanism for overcoming the presumption that the seller's statements, even if heard by the actual buyer, are a basis of the bargain.

Much of the case law supports this "belief" principle. A

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33. The district court's interpretation of the "basis of the bargain" requirement is also objective in the weaker sense that in order to constitute an express warranty, a seller's statements must "*naturally*" induce the purchase of the product," 4 J.A. 234 (emphasis added). To that extent, we agree with the district court. However, for reasons explained in the text, we do not believe that either New Jersey or the drafters of the U.C.C. intended the buyer's awareness of, or belief in, the statements to be completely irrelevant.

statement in the bill of sale that the goods are new does not constitute an express warranty when both the buyer and the seller knew that the statement was false. *See Coffee v. Ulysses Irrigation Pipe Co.*, 501 F.Supp. 239 (N.D. Tex.1980) When a buyer has operated trucks before and knows that they need repairs, he cannot sue in express warranty on the seller's statement that the trucks were in good condition. *See Janssen v. Hook*, 1 Ill.App.3d 318, 272 N.E.2d 385 (1971). "The same representation that could have constituted an express warranty early in the series of transactions might not have qualified as an express warranty in a later transaction if the buyer had acquired independent knowledge as to the fact asserted." *Royal Business Machines v. Lorraine Corp.*, 633 F.2d 34, 44 (7th Cir.1980). *See also Overstreet v. Norden Laboratories, Inc.*, 669 F.2d 1286, 1291 (6th Cir.1982) ("[A] statement known to be incorrect cannot be an inducement to enter a bargain."); *Wendt v. Beardmore Suburban Chevrolet, Inc.*, 219 Neb. 775, 782, 366 N.W.2d 424, 429 (1985) (Car dealer's statement were not a basis of the bargain when plaintiff suspected that the car had been in an accident and had his mechanic inspect it.).

Although these cases reject, to a certain extent, one traditional contract principle, that terms should be construed objectively, they embrace another traditional contract principle, that of looking at the intention of the parties in light of the surrounding circumstances. *See* 3 R. Anderson, *Uniform Commercial Code* § 2-313:36, at 29 (1983 & Supp.1987). The relevant intent is that the statement be part of the basis of the bargain, and that, "as in the case of any contract term, is a question of the intent of the parties." *Id.* at 30.[34]

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34. Although we have emphasized the relevance of a buyer's *belief*, our construction of section 2-213 can be read as simply fleshing out the more

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Appendix A

B.

Applying our interpretation of section 2-313 to the case at bar, we conclude that the district court's jury instructions were erroneous for two reasons. First they did not require the plaintiff to prove that Mrs. Cipollone had read, seen, or heard the advertisements at issue. Second, they did not permit the defendant to prove that although Mrs. Cipollone had read, seen, or heard the advertisements, she did not believe the safety assurances contained therein. We must therefore reverse and remand for a new trial on this issue.

There is ample evidence from which a jury could conclude that Mrs. Cipollone saw, read, or heard the advertisements. She frequently listened to the Arthur Godfrey show, and frequently read magazines that contained the advertisements. Thus, the awareness question is not problematic. However, there is also evidence that family members brought the hazards of smoking to her attention. Thus Liggett might be able to prove that she did not believe the advertisements that she saw.

Liggett contends that in light of the jury's answers to special

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commonly discussed *reliance* requirement with a framework of shifting presumptions and burdens of proof. Thus, in the context of advertisements claimed to be warranties, a plaintiff buyer must first prove that she saw the advertisements. This raises a (rebuttable) presumption of belief, which in turn raises an irrebuttable presumption of reliance. Next, a defendant seller may rebut the presumption of reliance, but only by proving that the plaintiff disbelieved the advertisement. *Cf. supra* note 28. Successfully proving disbelief creates a new rebuttable presumption by proving reliance directly. *See supra* note 31. Whether our holding is read as imposing a "belief" requirement or a "reliance" requirement thus is probably just a question of semantics, not substance.

Appendix A

verdict questions 10 and 12, which addresses Mrs. Cipollone's cigarette use notwithstanding knowledge of the hazard, a new trial is inappropriate because it is entitled to a verdict in its favor on the express warranty claim as a matter of law.[35] We disagree. First, as explained above in part IV, the district court's jury instructions with respect to questions 10 and 12 did not limit the inquiry into Mrs. Cipollone's conduct to the pre-1966 period. Because the only potential warranties at issue in this case are Liggett's pre-1966 advertisements, in order to find no warranties the jury must find that Mrs. Cipollone disbelieved Liggett's pre-1966 advertisements, and it did not have an opportunity to do so.

Questions 10 and 12 also do not ask specifically whether Mrs. Cipollone knew that the advertisements were false. The jury's answers indicate that Mrs. Cipollone should have known cigarettes were harmful, despite Liggett's failure to warn. That does not mean that she actually knew that cigarettes were harmful, when Liggett was advertising to the contrary. The jury must be asked whether she disbelieved the advertisements. This is an inquiry distinct from (1) whether she should have disbelieved the advertisements,[36] and (2) whether it would have been unreasonable to smoke had Liggett not been advertising that smoking was safe. Consequently, Liggett is not entitled to rely on the jury's answers to these questions to preclude a new trial on the question whether its advertisements constituted express warranties.

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35. Liggett invokes the doctorine of "estoppel by verdict." For the reasons explained in the text, we do not find that doctrine applicable.

36. We note that if she should have disbelieved the advertisements it is not likely that the advertisements would naturally induce the purchase of the product.

VII. DID THE DISTRICT COURT ERR IN FAILING TO INSTRUCT THE JURY THAT COMPARATIVE FAULT PRINCIPLES APPLY TO AN EXPRESS WARRANTY CLAIM?

A.

Liggett contends that New Jersey law permits a manufacturer to assert a comparative fault to an express warranty products liability suit and that the district court consequently erred in failing to so instruct the jury. We agree that comparative fault principles may be applicable in some express warranty cases, but we do not believe that they are applicable here.

In *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965), the plaintiff alleged that the brakes on his employer's leased truck failed, causing an accident. Cintrone sued the lessor, alleging that the defendant had breached its "warranty that the vehicle was fit and safe for use. (Whether the alleged warranty was express or implied was not specified.)." *Id.* at 438, 212 A.2d at 771. The defendant asserted that the plaintiff could not recover because the problem with the truck's brakes was known to the plaintiff before the accident. The New Jersey Supreme Court held that on the facts of the case the jury could have concluded that the plaintiff "with knowledge of the danger presented by the defective brakes failed to take the care for his own safety which a reasonably prudent person would have taken under the circumstances. Therefore, it would have been improper for the trial court to have removed the defense of contributory negligence from jury consideration." *Id.* at 459, 212 A.2d at 783.

In *Maiorino v. Weco Products Co.*, 45 N.J. 570, 214 A.2d

18 (1965) (per curiam) the New Jersey Supreme Court also held that contributory fault was a defense to a breach of warranty suit. In that case, the plaintiff injured himself while attempting to open the glass container on his newly purchased toothbrush. The plaintiff sued the manufacturer charging negligence and breaches of implied warranties of merchantability and fitness of the product for use. The Supreme Court held that a contributory fault defense was properly submitted to the jury:

> As we pointed out in *Cintrone*, the authorities in various jurisdictions are in confusion and seeming conflict on the subject of availability of the defense of contributory negligence in products liability cases based on breach of express or implied warranty of fitness. The various texts and cases referred to therein reveal that most jurisdictions bar plaintiff's recovery where his misuse or abuse of the product in combination with a defect in the product, brings about his personal injury, or where he continued to use the product with knowledge, actual or constructive, or its defective condition . . . .

Id. at 573, 214 A.2d at 19.

The issue before us, whether comparative fault is available in an express warranty action, was not addressed in either *Cintrone* or *Maiorino*. Neither of those cases clearly involved express warranties.[37] The last time we were faced with this issue was in

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37. The differences between express and implied warranties are significant in this context. Implied warranties involve societal standards imposed by law. (Cont'd)

a case involving the same defendant and, indeed, many of the same warranties. In *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 485 (3d Cir.1965), interpreting Pennsylvania law, we found that the doctrine of assumption of risk, in its primary sense, was available as an affirmative defense in an express warranty claim.

Crucial to our analysis in *Pritchard* was the distinction between primary and secondary assumption of risk. In its primary sense, assumption of risk involves a voluntary exposure to a known danger, which negates liability. "Under this concept recovery is barred because the plaintiff is assumed to have relieved the defendant of any duty to protect him." *Id.* at 484. In its secondary sense, assumption of risk is synonymous with contributory negligence—a plaintiff is barred from recovery because of her departure from reasonable standards of care, despite the negligence of the defendant. *Id.*

In *Pritchard*, we concluded that assumption of risk in the

(Cont'd)

Express warranties involve standards that the seller promises to deliver. If implied warranties hold sellers responsible for legally imposed duties of care, it only seems fair that buyers are held responsible to similar legally imposed standards of due care. Thus, the New Jersey Supreme Court has held that comparative fault principles should apply in implied warranty cases. However, the legally enforced obligation to honor express warranties stems from society's interest in enforcing promises. *See Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 579, 489 A.2d 660, 672 (1985). It is not nearly as clear that what the buyer does should be relevant in determining whether the law will hold the seller liable for what it has promised. Thus, because *Maiorino* involved only implied warranties and *Cintrone* did not specify whether there was any express warranty involved, we do not read those cases to stand for the proposition that comparative fault principles automatically apply in express warranty cases.

sense of contributory negligence is not available in a breach of warranty action. We then concluded that "a person who voluntarily exposes himself to a danger of which he has knowledge, or has had notice, assumes the attendant risk." *Id.* at 485. This reading is in accord with Dean Prosser's views:

> [T]he plaintiff['s] . . . failure . . . to take precautions against [the] possible existence [of a product's danger does] not . . . bar . . . an action for breach of warranty . . . . But if he discovers the defect, or knows the danger arising from it, and proceeds nevertheless deliberately to encounter it by making use of the product, his conduct is the kind of contributory negligence which overlaps assumption of risk; and on either theory his recovery is barred.

Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791, 838-39 (1966).

We reversed the jury verdict for the defendant in *Pritchard* because we found that under the more narrow, primary definition of assumption of risk, the jury could not have concluded that the plaintiff voluntarily exposed himself to a known danger. We found that the jury instructions "were inadequate and confusing in that they failed to differentiate between the primary and secondary concepts [of assumption of risk]." 350 F.2d at 486. In reaching that conclusion we noted that "the defendant's advertisements carried factual affirmations, professedly based on medical research [and that the advertisements] were calculated to overcome any fears the potential consumers might have had as to the harmful effects of cigarettes, and particularly Chesterfields. Under the circumstances it is difficult to perceive

how the plaintiff, a cabinetmaker with no scientific background, could have been charged with notice or knowledge of a danger, which the defendant, with its professed superior knowledge, extensively advertised did not exist." *Id. Pritchard*, however, which involves Pennsylvania law, does not control this case.

The New Jersey cases, *Cintrone* and *Maiorino*, do not speak to whether a comparative fault defense is available in an express warranty action. Even *Pritchard's* previous interpretation of Pennsylvania's express warranty law indicates that comparative fault is available only to the extent that a plaintiff voluntarily exposes herself to a danger of which she had specific knowledge. In order to answer Liggett's contention that comparative fault — in the sense of primary assumption of risk — should be available as a defense to this express warranty claim, we turn to an analysis of the warranty involved here.

As is discussed in Part VI, in order to make out a *prima facie* express warranty claim, Mr. Cipollone must show that Liggett's affirmations were part of the basis of the bargain. As long as the plaintiff can show that Mrs. Cipollone knew of Liggett's affirmations of fact, those affirmations are presumed to be a basis of the bargain unless Liggett can prove that she did not believe those advertisements. Arthur Godfrey referred to the fears about smoking as "applesauce." 5 J.A. 158.[38] If Mrs. Cipollone believed him, she could not have had the subjective knowledge about the harms of smoking that would permit a jury

38. Defendant has not argued, nor do we believe that they could argue, that belief in their advertisements was unreasonable.

to conclude that she voluntarily assumed a known risk.[39]

In theory, the comparative fault defense is available to Liggett to the extent that it can prove that after having believed the advertisements, Mrs. Cipollone learned that they were untrue and continued to smoke the cigarettes that the advertisements had caused her to buy. The court must recognize, however, that any cigarettes that plaintiff bought after she ceased believing in defendant's affirmations would not, as a matter of law, be cigarettes smoked in breach of the warranty. The warranty would not exist as to those cigarettes because Mrs. Cipollone would not have believed Liggett's affirmations when she bought them. Thus, although it would be theoretically possible for the defendants to win on a comparative fault defense that did not involve misuse or abuse, as a practical matter it would be almost impossible. If the jury finds that the cigarettes that Mrs. Cipollone smoked in breach of the express warranty proximately caused her cancer, then it is implicitly finding that she believed the advertisements when she bought those cigarettes.

If she bought some cigarettes while believing in the advertisements and then learned that the advertisements were false and smoked those previously purchased cigarettes anyway, then she would have been assuming a known risk when she smoked the previously purchased, warranted cigarettes. We conclude that under such circumstances, she could be barred, by reason of contributory fault, from recovering on an express warranty claim.

39. Defendants could prevent Mr. Cipollone's recovery on the express warranty claim if, despite finding the warranty, the jury finds that the plaintiff misused or abused the cigarettes. There is no evidence of misuse or abuse in this record, however. Plaintiff was using the cigarettes just as Liggett advertised that she should.

But that would require a jury finding that it was those specific cigarettes, bought while believing the advertisements but smoked after she knew that the ads were false, that caused her cancer. No reasonable jury could find this unless Mrs. Cipollone bought vast amounts of cigarettes in bulk, and there is no evidence in the record that she did.

Liggett's defense is thus more appropriate in the more typical U.C.C. case. For instance, if a tire purchaser relied on the affirmations of the seller, then discovered that the seller's affirmation was false, and then used the tire anyway, she could be barred from recovering on an express warranty claim under an assumption of risk theory. Because the purchaser believed the affirmations when she purchased the tire, the tire would be warranted. Still the law would not allow her to collect on that warranty if she used the tire after she learned that the seller's affirmations were false. This scenario is inapplicable in the cigarette context because the few cigarettes used after learning of a warranty's falsity cannot cause the kind of harm that one defective tire can.

In sum, we find that a comparative fault defense is available in an express warranty action, but only to the extent that the defendant can show that the buyer misused or abused the product or used the product after learning that the warranty was false. We do not think that that would be possible in this case. There is no evidence that Mrs. Cipollone misused cigarettes. To the extent that she knew cigarettes were bad for her and hence did not believe Liggett's advertisments to the contrary, she cannot collect on an express warranty theory, but not because she assumed the risk of the cigarettes. If she did not believe the advertisements, then they could not have formed a basis of the bargain in the first

place, and the jury could not find an express warranty.[40]

B.

The same rationale that overcomes Liggett's comparative fault defense overcomes Liggett's contention that Mrs. Cipollone's knowledge of the advertisements' falsity breaks the chain of causation linking Liggett's breach to Mrs. Cipollone's injury. Liggett contends that the district court erred in failing to instruct the jury that if a buyer uses a product with knowledge of its warranty-breaching defect, any personal injuries arising from that use did not proximately result from the breach of warranty. Arguably, section 2-715 of the U.C.C., which provides that "[c]onsequential damages resulting from the seller's breach include . . . injury to person . . . proximately resulting from any breach of warranty," required such an instruction. *See* N.J.S.A. § 12A:2-715.[41]

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40. As an alternative basis for declining to grant Liggett's motion for a new trial or judgment n.o.v. on this issue, the district court held that Liggett had failed to object to the jury charge on the issue of contributory fault with respect to the express warranty claim and had therefore waived it pursuant to Fed.R.Civ.P. 51. Although this issue is now no longer relevant, both because there will be a new trial and because of our finding that comparative fault could not be applicable in this case unless Liggett can prove abuse or misuse, we are satisfied that Liggett did adequately object to the district court's ruling on this issue. *See* Defendant's Objections

41. In its opinion denying Liggett judgment n.o.v., the district court held that Liggett had waived this point by failing to object to jury instructions at trial. *See* Fed.R.Civ.P. 51. As in the district courts waiver detemination in the comparative fault context, the waiver issue is no longer relevant because there will be a new trial. Nonetheless, given the complexity of the case, and the potential importance of this issue on retrial, we think it important to give the district court the benefit of our views on this aspect of the matter.

Liggett relies on U.C.C. Official Comment 5 to section 2-715 ("[I]f [the injured person] discover[ed] the defect prior to his use, the injury would not approximately result from the breach of warranty.") and New Jersey Study Comment 1 to section 12A:2-715 ("[I]f the buyer's own fault or negligence contributes to the injury (e.g., by using the goods with knowledge of their defects), he cannot recover consequential damages, because such damages are not proximately due to the breach of warranty."). Both of these comments imply that the buyer's knowledge of a defect breaks the chain of proximate causation because, in effect, the plaintiff's behavior is an intervening cause. The seller could not reasonably foresee that a buyer would use a product once that buyer learned that the product was defective.

Like the comparative fault defense, however, the knowledge-as-intervening-cause argument applies in the kind of case represented in the tire hypothetical outlined above, not the cigarette sales at issue in this case. If a buyer uses a tire after having discovered a warranty-breaching condition that makes use of that tire unreasonable, then she cannot collect consequential damages under the warranty. In the instant case, however, once the plaintiff discovered that Liggett's advertisements were false, the cigarettes she purchased after that time must, as a matter of law, have been unwarranted, and therefore would not be considered by a jury asked to determine whether the cigarettes she smoked that were in breach of Liggett's warranty proximately caused her lung cancer.

Thus, both the comparative fault and the causal chain arguments fail to defeat the express warranty claim because both contentions depend on Liggett's proving that Mrs. Cipollone *knew* that the advertisements were false. But the basis of the bargain provision in N.J.S.A. § 12A:2-313 requires that the buyer believe the advertisements. If Liggett proves that she did not believe their

advertisements, then there is no warranty in the first place. In other kinds of cases, subsequently acquired knowledge and use may constitute either comparative fault or an intervening cause sufficient to bar recovery, but in those cases there is sufficient time for the plaintiff to buy the product while believing in the warranty, subsequently learn of the warranty's falsity, and proceed to use the product nonetheless. If that subsequent use results in serious damage, the buyer cannot recover. No serious damage could result from a comparable kind of "subsequent use" in this case because Mrs. Cipollone could not have been seriously hurt from cigarettes bought while believing in the advertisements but smokes after learning of the advertisements' falsity.

Liggett must be given the opportunity at the outset to prove that at some point prior to January 1, 1966, Mrs. Cipollone ceased to believe, or never believed, Liggett's advertisements. If the jury finds such disbelief, they must be instructed to find that the advertisements could not have formed the basis of the bargain for cigarettes she purchased after that date. As to cigarettes purchased and smoked before that date, however, for which the advertisements would constitute a basis of the bargain, Liggett should not be given another opportunity to prove what they failed to prove in the first instance, i.e. that Mrs. Cipollone did not believe the advertisements.

VIII. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT A JURY FINDING THAT MRS. CIPOLLONE'S INJURY WAS CAUSED BY LIGGETT'S BREACH OF EXPRESS WARRANTY?

Liggett contends that it is entitled to judgment n.o.v. on the express warranty claim because the record contains insufficient evidence to support a jury verdict for Mr. Cipollone on this point.

Appendix A

At the outset, we note that the express warranty provision of the Uniform Commercial Code, section 2-313, makes clear that no formality or magic words are required to create an express warranty. "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty . . . ." N.J.S.A. § 12A:2-313(2) (1970). The seller may be liable if its representation regarding the goods takes the form of newspaper, magazine, radio or television advertisements. *See Collins v. Uniroyal, Inc.*, 126 N.J.Super. 401, 405, 315 A.2d 30, 33 (App.Div. 1973) (per curiam), *aff'd*, 64 N.J. 260, 315 A.2d 16 (1974) (per curiam); *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 358 (6th Cir.1978); J. White & R. Summers, *Uniform Commercial Code* 335-36 (2d ed. 1980). Consequently, Mr. Cipollone was free to rely, as he did, on advertisements to prove the existence and scope of Liggett's warranty.[42]

A.

Liggett contends that the record contains insufficient evidence

42. Liggett commences its argument by pointing out that to recover on an express warranty claim, the plaintiff must show a *breach* of an express warranty. We agree. A suit cannot be maintained on an express warranty theory if the injury complained of resulted from an occurrence or product characteristic outside the scope of the express warranty. If a tire manufacturer, for example, warrants against blowouts when its tires are "used in normal passenger car service," a suit cannot be maintained on an express warranty theory if the blowout complained of occurred while the car was not being used in normal passenger car service. *See Collins*, 126 N.J. Super. at 405, 315 A.2d at 33-34. The manufacturer may, however, make warranties that go far beyond promising that the goods will be free from defect, and if it does so, the freedom of the product from defect is irrelevant to an express warranty claim. *See Collins*, 64 N.J. at 262, 315 A.2d at 17. As our discussion makes clear, however, we think that there is sufficient evidence of both (1) the existence of a warranty that cigarettes were safe and (2) breach of that warranty.

Appendix A

to support a finding that Liggett breached any warranty in the instant case. More specifically, Liggett maintains that there is insufficient evidence "to support a finding that Liggett made any express warranty warranting against serious health effects in the future from long term cigarette use." Liggett Br. at 34-35. Although the question whether a particular set of representations made by the seller amounts to an express warranty is normally one of fact, and consequently for the jury to decide, *see Gladden v. Cadillac Motor Car Division*, 83 N.J. 320, 325, 416 A.2d 394, 396 (1980), a judgment n.o.v. may be granted under Fed.R.Civ.P. 50(b) if the record is " ' "critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." ' " *Powell v. J.T. Posey Co.*, 766 F.2d 131, 133-34 (3d Cir.1985) (citations omitted). This question is one of law, over which our review is plenary. *See id.* at 134.

Many Chesterfield and L & M advertisements were submitted to the jury. Liggett contends that "[n]one of them could constitute to a reasonable person a warranty covering serious health effects in the future from long term use of cigarettes." Liggett's Br. at 35. We disagree.

One Chesterfield advertisement stated, without qualification, that "NOSE, THROAT, and Accessory Organs [are] not Adversely Affected by Smoking Chesterfields." *See supra* at 548. The advertisement discussed a "study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes" on a study group that included "men and women" who had "continually" smoked "10 to 40" cigarettes per day for "one to thirty years." Members of the study group were "given a thorough examination, including X-ray pictures" at "the beginning and at the end of" a "six-month[ ] period." According to the advertisement, "[t]he medical specialist, after a thorough

examination of every member of the group," concluded that "the ears, nose, throat and accessory organs of all participating subjects examined . . . were not adversely affected in the six-month period by smoking the cigarettes provided."

In a radio commercial, Arthur Godfrey related the story of another of these "six-month[ ] period" studies involving thirty-year chain smokers and stated that the study was "proof" of the proposition that Chesterfield cigarettes "never . . . did you any harm." *See supra* at 549. Mr. Godfrey also told his listeners that he could not remember ever seeing a "gravestone" stating that the buried individual had "[s]moked [t]oo [m]uch." *See supra* note 2. One magazine advertisement declared in a bold typescript that the consumer should "PLAY SAFE" and "Smoke Chesterfield." *See supra* at 548. A series of television and magazine advertisements for the L & M brand stated that the cigarettes were "just what the doctor ordered." *See supra* at 550.

We hold that a reasonable jury could conclude from these advertisements, and the many others entered into evidence, that Liggett had represented to the consumer that the long-term smoking of Chesterfield and L & M cigarettes would not endanger the consumer's health, and that these warranties were untrue. Liggett cannot be granted judgment n.o.v. on the ground that the advertisements represented only that short-term smoking was safe. A reasonable jury could infer that an unqualified representation that smoking is safe creates a warranty that smoking for a long period of time is safe.

Furthermore, several of the purported "studies" conducted by "medical specialists" from a "responsible consulting organization" involved smokers who, the advertisements took care to note, smoked heavily for up to thirty years. A reasonable jury

could interpret the inclusion of persons who had smoked heavily for thirty years in the studies as representing that smoking for a long period of time was safe. "[B]road general assertions of quality, and particularly those of safety, as for example that . . . cigarettes are . . . 'harmless' or 'safe to smoke,' may readily be found by the jury to include a representation that there is nothing to make the product unsafe." W. Prosser, *Handbook of the Law of Torts* 653 (4th ed. 1971). Indeed, the last time we reviewed the Liggett advertisements at issue in this case, we concluded that "[t]he evidence compelling points to an express warranty, for the defendant, by means of various advertising media, not only repeatedly assured [the consumer] that smoking Chesterfields was absolutely harmless, but in addition the jury could very well have concluded that there were express assurances of no harmful effect on the lungs." *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 296 (3d Cir.1961). The district court did not err in refusing to grant judgment n.o.v. on the ground that Mr. Cipollone failed to introduce sufficient evidence to uphold the jury verdict with respect to the scope of Liggett's express warranty.

B.

Neither do we find, as Liggett contends, that there was insufficient evidence to prove that Mrs. Cipollone's smoking caused her cancer. In its opinion denying Liggett's motion for a judgment n.o.v., the district court concluded that Liggett's "no adverse effects" Chesterfield advertisements began to run in 1952, *see* 693 F.Supp. at 214 & n. 8, a conclusion supported by the evidence discussed above and which the plaintiff has not challenged in its brief. The evidence also supports the conclusion that the L & M "just what the doctor ordered" advertisements began before Mrs. Cipollone switched to that brand in 1955. Hence the jury could have found that Mrs. Cipollone smoked cigarettes that

were in breach of warranty from 1952 until as late as 1966 (the date at which the express warranty claim is cut off by our interlocutory preemption decision).

The jury found that Mrs. Cipollone's smoking of cigarettes that were in breach of the warranty proximately caused her lung cancer and death. *See* Special Verdict Question 15 (quoted *supra* at 554). Liggett contends that the record does not contain sufficient evidence to support this finding and that the district court consequently erred in declining to grant judgment n.o.v. on this point. Although a great deal of evidence was introduced that Mrs. Cipollone's cancer was caused by her 40 years of smoking, Liggett contends that there is no evidence that demonstrates that her cancer was caused by smoking from the years 1952 to 1966. We disagree. As previously noted a judgment n.o.v. may be granted only if the record is " ' "critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." ' " *Powell,* 766 F.2d at 133-34 (citations omitted).

The statistical correlation between heavy smoking and lung cancer is well-documented.[43] The plaintiff presented expert

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43. In 1984, Congress mandated rotating warnings on cigarette packages; one of these warnings states "SURGEON GENERAL'S WARNING: SMOKING CAUSES LUNG CANCER . . . . " 15 U.S.C. § 1333(a)(1) (Supp. II 1984). The Surgeon General has concluded that "the case for cigarette smoking as the principal cause of lung cancer is overwhelming." U.S. Dep't Health & Human Serv., *The Health Consequences of Smoking: Nicotine Addiction—A Report of the Surgeon General* 11 (1988) (quoting U.S. Public Health Service, *The Health Consequences of Smoking: A Public Service Review—1967* (rev. ed. 1968)). *See also* U.S. Dep't Health & Human Serv., *The Health Consequences of Smoking: Cancer—A Report of the Surgeon General* (1982); U.S. Dep't Health & Human Serv., *The Health Consequences of Smoking for Women: A Report of the Surgeon General* (1980); U.S. Dep't Health, Educ. & Welfare, *Smoking* (Cont'd)

testimony from qualified witnesses that smokers are much more likely to contract lung cancer than non-smokers, especially non-smokers such as Mrs. Cipollone, for whom there is no evidence of exposure to any cancer causing agent other than cigarette smoke. In addition, these experts testified that Mrs. Cipollone's early years of smoking contributed more — on a year-to-year basis — than her later years of smoking because the lung injury produced from smoking early on is an injury that has many more years of potential to develop cancer than the injury incurred later in life.

The district court instructed the jury that it could find proximate cause in a case in which "[t]here may be two or more concurrent and directly cooperative and efficient proximate causes of an injury" if the defendant was "a substantial contributing factor in [causing the plaintiff's] injuries." As we have explained, these instructions were correct. Under these instructions, the jury could have reasonably concluded from the foregoing evidence that Mrs. Cipollone's smoking from 1952 to 1966 proximately caused her lung cancer. Her smoking from 1952 to 1966 could clearly have been found to be "a substantial contributing factor" in the development of her lung cancer. Liggett has not challenged the jury instructions' definition of proximate cause on appeal with respect to the express warranty claim.

Mr. Cipollone presented sufficient evidence concerning the causal link between Mrs. Cipollone's lung cancer and her smoking between 1952 and 1966 that a grant of judgment n.o.v. on this issue under Fed.R.Civ.P. 50(b) would not have been appropriate.

(Cont'd)
and Health: A Report of the Surgeon General (1979); U.S. Dep't Health, Educ. & Welfare, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* (1964).

Appendix A

IX. THE RISK-UTILITY CLAIM

The District Court ruled that the New Jersey Products Liability Act, N.J.S.A. § 2A:58C (hereafter "The Act") operated in this case to bar plaintiff's risk-utility claim.[44] Section 3(a)(2) of the Act provides that if the plaintiff asserts a design defect claim against a manufacturer, the manufacturer shall not be liable if:

> The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended . . . .

To the extent that the Act imposed new rules with regard to the imposition of liability, it purported only to apply to actions filed after the date of its enactment. Section 8 of the Act provides that the act "shall take effect immediately except that provisions of this act that establish new rules with respect to burden of proof or the imposition of liability in product liability actions shall apply only to product liability actions filed on or after the date of enactment." In its October 27, 1987, opinion, however, the district court found that, based on the New Jersey Assembly Insurance Committee's report, the New Jersey legislature intended section 3(a)(2) to be a codification of existing common law and hence that the legislature intended that section to be applied retroactively.

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44. The risk-utility claim alleged that the risk of cigarettes outweighed their social utility. *See* Plaintiff's Third Amended Complaint, 1 J.A. 39, 42.

Appendix A

Although the district court disagreed with the legislature on the question whether section 3(a)(2) was a codification of existing law, the court nonetheless held that section 3(a)(2) applied to the Cipollone case, even though it was filed before the Act became law, because the legislature's belief that it was not a new rule reflected an intent that the rule be applied retroactively.

The applicability of section 3(a)(2) to claims like this is currently before the New Jersey Supreme Court in another tobacco case, *Dewey v. Brown & Williamson Tobacco Corp.*, 225 N.J.Super. 375, 542 A.2d 919 (App.Div.), *certif. granted*, 113 N.J. 379, 550 A.2d 481 (1988). We think it highly unlikely that the issue will not be resolved definitively by the time the instant case is re-tried. Therefore, we will not dwell at length on the issue.

We do not believe that section 3(a)(2) was a codification of existing common law, although it may have been a clarification of New Jersey law. *See* N.J.S.A. 2A:58C-1, Senate Judiciary Committee Statement at 464-65 ("These sections [2-4] are intended to establish clear rules with respect to specific matters as to which the decisions of the courts in New Jersey have created uncertainty."). *See also Whitehead v. St. Joe Lead Co.*, 729 F.2d 238 (3d Cir.1984) (the levels at which lead exposure becomes dangerous are not generally known, but general public knowledge of danger is relevant to the risk-utility injury); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983) (generalized knowledge of above ground swimming pools did not prevent a risk-utility claim from going to the jury).

As a clarification, the provision was meant to be applied retroactively, because section 8's "prospective only" provision applies only to new rules. Nonetheless, we cannot affirm the district court's decision to deny, as a matter of law, plaintiff's generic

risk-utility claim because, applying the language of the Act, we cannot find, and we do not think that there was sufficient evidence for the district court to find, that the "inherent[ly] [dangerous] characteristic[s]" of cigarettes were known to the "ordinary consumer or user," prior to 1966. This is an issue of fact for the jury.[45]

Our view is in accord with what the Appellate Division of the Superior Court held in *Dewey*. That court wrote: "[w]e have no quarrel with defendant's proposition that plaintiff may not recover if a factfinder concludes that the death of her decedent was caused in large measure from exposure to the danger inherent in all cigarettes, a danger *acknowledged* to be within his contemplation as an ordinary consumer." 275 N.J.Super. at 386, 542 A.2d at 925 (emphasis added). No such ordinary consumer knowledge has been acknowledged in this case, and it is up to the jury to determine what the ordinary consumer knew. Therefore we will remand on this issue, and, if the New Jersey Supreme Court has not written expansively enough to dispose of this issue before the case is retried, the plaintiff should be allowed to proceed on his generic risk-utility claim.[46]

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45. The district court (in an unpublished opinion of October 27, 1987) apparently relied on comment i to Section 402A of the Restatement (Second) of Torts, which the drafters of the Product Liability Act meant to incorporate. *See* N.J.S.A. 2A:58C-1, Senate Judiciary Committee Statement at 465. Comment i says that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." As the Appellate Division of the Superior Court did in *Dewey*, 542 A.2d at 925, we reject the applicability of comment i in this situation. The fact that the New Jersey legislature endorsed comment i in 1987 does not mean that the ordinary consumer must have known about the harms of smoking in, for example, 1958.

46. The district court granted a directed verdict for the defendants on the (Cont'd)

X. PREJUDGMENT INTEREST

The district court denied plaintiff's request for prejudgment interest because the jury awarded the plaintiff contract, not tort damages. New Jersey Court Rule 4:42-11(b) reads as follows:

> (b) Tort Actions. Except where provided by statute . . . the court shall, in tort actions, including products liability actions, include in the judgment simple interest . . . .

The district court declined to follow *Collins v. Uniroyal, Inc.* 130 N.J.Super. 169, 325 A.2d 854 (Law Div.1974), in which the New Jersey Superior Court awarded prejudgment interest on an express warranty claim, because the court found that *Collins* was "contrary to the plain language of the provision." 696 F.Supp. 208, 221. The district court also found that there was no equitable basis for awarding prejudgment interest and that one of the purposes behind such an award, complete compensation of the plaintiff, would not be furthered because, theoretically, part of Mr. Cipollone's recovery on the express warranty claim was for loss of future services from his wife. *Id.* at 222.

Of course, the availability of prejudgment interest may be mooted on retrial because a new jury may not grant an award

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(Cont'd)
plaintiff's alternative design claim. *See* 683 F.Supp. 1487, 1493-95 (D.N.J.1988). This decision has not been appealed and thus the plaintiff will not be free to advance this claim again. However, we note that because the Federal Labeling Act, which formed the basis of our preemption decision, does not preempt design defect claims, plaintiff may (as of this writing) proceed against co-defendants Philip Morris and Lorillard, as well as Liggett, on the risk-utility claim.

on the basis of breach of express warranty.[47] If the new jury does grant such an award, however, we believe that the plaintiff should be entitled to some prejudgment interest. Unlike the district court, we do not find that the holding and logic of *Collins* is contrary to the plain language of the rule.

As the court in *Collins* pointed out, the language of the rule ("in tort actions, including products liability actions") indicates that the drafters wanted to include actions in addition to just those sounding in tort. Otherwise, the inclusion of the "products liability" language would be superfluous. *Collins,* 130 N.J.Super. at 172-73, 325 A.2d at 855. This is, of course, a products liability case. The court in *Collins* also emphasized that the policy underlying the rule is to inhibit delay and encourage settlement. 130 N.J.Super. at 173, 325 A.2d at 856. These policy concerns seem particularly applicable in the case at bar, which has already been the source of seven district court opinions, four of them published, and three published opinions by this court. Furthermore, *Collins,* a fifteen year old decision, has not been significantly questioned or challenged. We think it appropriate to defer to the New Jersey court's interpretation of the New Jersey Rule and therefore conclude that the district court erred to the extent that it held that prejudgment interest is never available on an express warranty products liability claim.

Neither do we believe that the New Jersey prejudgment interest is wholly inapplicable to future compensation awards. Rule 4:42-11(b) states that prejudgment interest is appropriate except in "exceptional cases." The district court reasoned that prejudgment interest was inappropriate, in part, because Mr.

47. It is not disputed that if there is a failure to warn award, prejudgment interest will be appropriate.

Cipollone's award was based on loss of *future* services. Nonetheless, the New Jersey Supreme Court, albeit in dictum, has said: "[t]he applicability of a compensation rationale for prejudgment interest may be questionable in the case of future losses, since it can be argued that those damages accrue after the judgment. However, the public interest in encouraging settlements is an adequate independent basis for the application of the prejudgment interest rule in this case." *Ruff v. Weintraub,* 105 N.J. 233, 245, 519 A.2d 1384, 1391 (1987). In light of the protracted nature of this litigation, we believe that the New Jersey Supreme Court would opt to follow their prescriptions in *Ruff. See also Salas by Salas v. Wang,* 846 F.2d 897, 908-10 (3d Cir.1988). Thus, in the absence of further guidance from the New Jersey courts on the point, which we would welcome, we do not believe that the post-judgment compensation element of an award in this case constitutes an "exceptional" circumstance that should "suspend the running of . . . prejudgment interest." Rule 4:42-11(b).

XI. DID THE DISTRICT COURT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT FOR MR. CIPOLLONE WITH RESPECT TO THE DEFENDANTS' STATUTE OF LIMITATIONS DEFENSE?

New Jersey has a two year statute of limitations for personal injury actions, *see* N.J.S.A. § 2A:14-2, and has adopted the discovery rule. Under this doctrine, a cause of action will be held not to accrue until the injured party " 'learns, or reasonably should learn, the existence of that *state of facts* which may equate in law with a cause of action.' " *Vispisiano v. Ashland Chemical Co.,* 107 N.J. 416, 426, 527 A.2d 66, 71 (1987) (per curiam) (citation omitted) (emphasis in original). Stated differently, a cause of action will be held not to accrue until the injured party

" 'discovers, or by the exercise of reasonable diligence and intelligence should have discovered[,] that he may have a basis for an actionable claim.' " *Id.* at 419, 527 A.2d at 67 (citation omitted).

Mrs. Cipollone's lawsuit was filed on August 1, 1983. The district court granted (partial) summary judgment against the defendants on their statute of limitations defense, holding that no reasonable jury could conclude that Mrs. Cipollone discovered, or by the exercise of reasonable diligence should have discovered, the facts giving rise to her claims prior to August 1, 1981. Liggett contends that the evidence in the record was sufficient to support a jury finding that Mrs. Cipollone discovered or should have discovered the facts giving rise to her claim before August 1, 1981.

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact. Our review is *de novo*. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The relevant facts are as follows. Mrs. Cipollone went to Dr. Alfred Lowy on July 23, 1981 for her regular medical checkup and x-ray. At that time, Dr. Lowy told her that he had discovered a spot on her lung. Mrs. Cipollone believed that this spot could be cancer caused by her smoking. She testified:

> Q: When Dr. Lowy told you you had a spot on your lung, you got scared? A: Yes.
>
> Q: You got scared because you knew what the significance of that could be, didn't you? A: Yes.

> Q: You were afraid that it could mean lung cancer? A: That's right.
>
> Q: You knew that cigarette smoking had been connected with cancer as you told us? A: Yes.
>
> Q: So you were afraid right then and there that you could have lung cancer from cigarette smoking, isn't that a fact? A: Right.

There is also ample evidence in the record from which the jury could conclude that Mrs. Cipollone knew that lung cancer was often caused by smoking.

Dr. Lowy did not tell Mrs. Cipollone that she might have lung cancer, but advised Mrs. Cipollone to see a lung specialist immediately. He recommended Dr. Seriff, whom Mrs. Cipollone went to see the next day. Dr. Seriff inquired about Mrs. Cipollone's smoking history and advised her, as he advises all of his patients, to stop smoking. Although Dr. Seriff formulated five differential diagnoses of her condition, one of which was primary lung cancer,[48] "[b]ased on the appearance of Mrs. Cipollone's x-rays,

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48. Dr. Seriff's affidavit states that "[m]y impression [on July 24, 1981] included the following possibilities:

> A. Resolving pneumonia;
>
> B. Primary lung cancer;
>
> C. Dog parasite (difillaria immitus)—giving a round area of inflammation;
>
> D. Carcinoid of the lung;
>
> E. Metastic lung tumor—unlikely."

[he] initially believed she had a pneumonia or viral infection and treated her with antibiotic medications." Dr. Seriff did not tell her that there was a possibility that she had lung cancer, but upon leaving Dr. Seriff's office, Mrs. Cipollone quit smoking for the first time in twenty-four years.

Dr. Seriff saw Mrs. Cipollone for the second time on July 30, 1981. He later affirmed that "[t]here was no definite change in her x-ray as a result of the antibiotic medication, therefore I began to feel it was less likely that she had a slowly resolving pneumonia causing the shadow." He still did not inform her that she might have cancer; he told her that his "impression" was that she had a viral infection.

At this point, Mrs. Cipollone certainly did not know that she had lung cancer. However, by this time, she knew that she had a spot on her lung and believed that the spot could be cancer caused by smoking. Indeed, she must have feared that she might get lung cancer from smoking, having made repeated novenas to St. Jude over the years in the hopes of avoiding it. She could have asked Dr. Seriff whether she might have cancer. Thus, although we think that the question is close, we conclude that a reasonable jury could find that Mrs. Cipollone " 'by the exercise of reasonable diligence and intelligence should have discovered' " that she " 'may have [had] a basis for an actionable claim' " prior to July 30, 1981.[49] *Vispisiano*, 107 N.J. at 419, 527

49. If July 30, 1981, the date of Mrs. Cipollone's second visit to Dr. Seriff, was the first day on which she should have known that she might have lung cancer, her suit was timely filed because July 30, 1983 was a Saturday. Under New Jersey law, the limitations period extends to the first day on which legal business can be transacted, which was August 1, 1983, the day she filed her suit.

A.2d at 67.[50]

Mr. Cipollone argues, in essence, that if Dr. Seriff did not know with reasonable medical certainty by August 1, 1981 that Mrs. Cipollone had lung cancer from smoking, then it would be unreasonable to expect Mrs. Cipollone to know this information. The problem with this argument is that it misstates the applicable legal test. The statute of limitations did not start running when Mrs. Cipollone knew that she had cancer from smoking; it started to run when she, by exercising reasonable diligence, should have known that she *might* have had cancer from smoking. Accordingly the issue will have to be tried.

We do not, of course, hold that Mr. Cipollone's claims are barred by the two year statute of limitations. We hold only that a jury could conclude that they are and that summary judgment was therefore inappropriate on this issue.

50. The *Vispisiano* case provides the legal standard by which we judge this issue, but we do not find the facts or the language of that case particularly helpful. The touchstone of *Vispisiano* is that the causal connection between toxic chemicals in the marketplace and cancer is not generally known. This is not so with smoking and cancer. Second, the language of *Vispisiano* can be used to argue either side of this case. Although *Vispisiano* found that medical confirmation was not necessary to start the statute running, 107 N.J. at 437, 527 A.2d at 77, the court also held that the statute could not start running until a plaintiff had "reasonable medical information" on which to base her belief that she might have a claim, *id.* at 435, 527 A.2d at 76. As of July 30, 1981, Mrs. Cipollone's knowledge that she might have lung cancer was based solely on her own suspicions after one visit to her general practitioner and one visit to a lung specialist who told her that she had a viral infection. However, taking into account the procedural posture of *Vispisiano* (a reversal of summary judgment for the defendants), we read that case's ambiguous language to mean that these fact bound inquiries should be left to the jury.

Appendix A

XII. DID THE DISTRICT COURT ERR IN HOLDING THAT FEDERAL LAW PREEMPTED PLAINTIFF'S INTENTIONAL TORT CLAIMS?

Mr. Cipollone contends that the district court misconstrued our decision on the preemptive effect of the Federal Cigarette Labeling and Advertising Act ("Labeling Act") by holding that it preempts post-1965 intentional tort claims.[51] As amended, the Labeling Act states:

> It is . . . the purpose of this chapter . . . to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1982 & Supp. II 1984).

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51. Mr. Cipollone also contends that our preemption decision was erroneous in order to preserve this issue for later review. The prior decision of this court is binding on this panel. *See* IOP Chapter 8C.

Appendix A

In our preemption decision, we applied the doctrine of implied preemption and held that in light of section 1331's declaration of Congressional purpose

> the Act preempts . . . state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes . . . . [W]here the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

789 F.2d at 187.

On remand, the district court interpreted our preemption decision as barring the plaintiff's failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud claims to the extent that they sought to challenge the defendants' advertising, promotional, and public relations activities after January 1, 1966. *See* 649 F.Supp. at 668, 675. Mr. Cipollone contends on appeal that the district court erred in construing our preemption decision to stand for "the extreme and untenable proposition that all of plaintiff's claims based on intentional tort, fraud and misrepresentation were preempted for the post-1966 period." Cipollone Br. at 43. Mr. Cipollone contends that "there is obviously a logical distinction between failure to warn, which derives from a breach of existing duty, and intentional misrepresentation, which emanates from defendants' affirmative and gratuitous undertaking to misrepresent facts to the public"

because "[l]iability imposed for intentional tort would not impose requirements on defendants with respect to the warnings contained on the label or in cigarette advertisements." *Id.* at 44-45.

We disagree. Our prior decision stated an unequivocal holding that "the Act preempts those state law damage actions relating to smoking and health that challenge . . . the propriety of a party's actions with respect to the advertising and promotion of cigarettes." 789 F.2d at 187. Plaintiff's intentional tort claim is founded on an allegation that defendants "intentionally, wil[l]fully, and wantonly, through their advertising, attempted to neutralize the [federally mandated] warnings that were given regarding the adverse effects of cigarette smoking." 649 F.Supp. at 673 (quoting count 6 of plaintiff's complaint). The plaintiff's claim manifestly "challege[s] . . . the propriety" of the defendants' "actions with respect to the advertising and promotion of cigarettes." 789 F.2d at 187. The district court did not err in construing our preemption decision.[52]

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52. Lorillard argues in its brief that Mr. Cipollone's risk-utility claim is also barred, impliedly, by the Labeling Act. As the language quoted in text indicates, however, the Labeling Act was meant to apply to cigarette companies' actions with respect to the advertising and promotion of cigarettes. The risk-utility claim involves the basic decision to market the product. *See supra* Part IX. As we held in our earlier preemption decision, "we cannot say that the scheme created by the Act is 'so pervasive' or 'so dominant' as to eradicate all of the Cipollone's claims. Nor are we persuaded that the object of the Act and the character of obligations imposed by it reveal a purpose to exert exclusive control over every aspect of the relationship between cigarettes and health." 789 F.2d at 186. We are also mindful of federalism concerns, which mandate a presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128-29, 68 L.Ed.2d 576 (1981). *See also Florida Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). ("[F]ederal regulation of a field (Cont'd)

XIII. CONCLUSION

For the foregoing reasons we will:

(1) affirm the district court's order dismissing plaintiff's post-1965 failure to warn, express, warranty, and intentional tort claims against the defendants Liggett, Lorillard, and Philip Morris;

(2) reverse the district court's order in favor of defendants Liggett, Lorillard, and Philip Morris, barring plaintiff's generic risk-utility claim as a matter of law;

(3) reverse the district court's judgment in favor of defendant, Liggett, and against plaintiff on plaintiff's failure to warn claim;

(4) reverse the district court's judgment in favor of plaintiff and against defendant, Liggett, on plaintiff's express warranty claim;

(5) reverse the district court's order granting plaintiff's motion for summary judgment striking defendants' affirmative defenses based on the statute of limitations; and

(6) reverse the district court's order denying prejudgment interest; and

(7) remand for a new trial.

(Cont'd)
of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."). In light of this binding precedent, we cannot interpret the Labelling Act in such a way as to bar Mr. Cipollone's risk-utility claim.

Appendix A

GIBBONS, Chief Judge, concurring:

I join in the opinion of the court. I write separately to observe that the enormous complications which arose during the trial of this complex case are largely due to the interlocutory ruling of this court in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir.1986), *cert. denied*, 484 U.S. 976, 108 S.Ct. 487, 98 L.Ed.2d 485 (1987), to the effect that some state law claims were preempted by the Federal Cigarette Label and Advertising Act (Labeling Act), 15 U.S.C. § 1331 (1982 & Supp. II, 1984). That ruling was made in a case in which this court granted leave to appeal pursuant to 28 U.S.C. § 1292(b) (1982). With the benefit of hindsight it seems clear to me that permission to appeal was improvidently granted. The case was legally and factually complicated, and our interlocutory ruling was made in the absence of a factual record which would have sharpened the issues and permitted a more informed application of the Labeling Act to the case. When a case involves multiple theories of liability, the application of which depends on what facts are found, it will rarely be true that an interlocutory appeal will "materially advance the ultimate termination of the litigation." Certainly that was not the effect of the interlocutory appeal in this case. The requirement in 28 U.S.C. § 1292(b) that the Court of Appeals give permission for a section 1292(b) appeal is intended to permit that court to avoid the kinds of indeterminate rulings which were made here and which do not materially advance anything but the lawyers' time meter.

More fundamentally, I believe that our interlocutory ruling on the preemptive effect of the Labeling Act, to the extent that we reached a definitive ruling, was wrong as a matter of law, and should be overruled by the court in banc. Had the district court proceeded to trial before presenting us with an opportunity to confuse things by an indeterminate and erroneous ruling on

Appendix A

preemption, this case would today be far closer to resolution. Instead there will now be a new trial, and a new appeal, and the Supreme Court may still tell the parties that our views on preemption are wrong, and they should try again. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S.Ct. 1704, 1712, 100 L.Ed.2d 158 (1988); *International Paper Co. v. Quellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

Thus, while I join in Part XII of the opinion of the court, I do so only because this panel is bound by what I believe to be an erroneous opinion of the Court.

APPENDIX B — SUPREME COURT DENIAL OF CERTIORARI DATED JANUARY 12, 1987

CIPOLLONE, ANTONIO, ETC. v. LIGGETT GROUP, INC. *et al.*,

No. 86-563

January 12, 1987

PRIOR HISTORY: C.A. 3d Cir.

REPORTED BELOW: 789 F.2d 181

DISPOSITION: Certiorari Denied.

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia

OPINION: The Petition for Writ of Certiorari is Denied.

APPENDIX C — OPINION OF UNITED STATES COURT OF APPEALS, THIRD CIRCUIT DATED APRIL 7, 1986

Antonio CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone

v.

LIGGETT GROUP, INC., a Delaware Corporation; Philip Morris Incorporated, a Virginia Corporation and Loew's Theatres, Inc., a New York Corporation.

Appeal of LIGGETT GROUP, INC.,
Appellant in 85-5073

Appeal of LOEW'S THEATRES, INC.,
Appellant in 85-5074

Nos. 85-5073, 85-5074.

United States Court of Appeals,
Third Circuit

Argued Feb. 13, 1986.

Decided April 7, 1986.

As Amended April 18, 1986.

Rehearing and Rehearing In Banc
Denied May 9, 1986.

Before HUNTER, SLOVITER, Circuit Judges, and GILES,* District Judge.

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* Honorable James T. Giles, United States District Judge for the District of Eastern Pennsylvania, sitting by designation.

Appendix C

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge.

This case, before the court on the district court's certification pursuant to 28 U.S.C. § 1292(b) (1982), presents the question whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1982) (the "Act"), preempts any or all of the state common law claims brought by appellee Antonio Cipollone and his wife Rose in the district court. Several of the claims in the Cipollones' complaint concern the alleged failure of the defendants, Liggett Group, Inc., Philip Morris Incorporated, Loews Corporation, Loew's Theatres, Inc. ("Lorillard"), to provide an adequate warning of the dangers of the cigarettes that they manufactured and sold. Because these claims implicate the legislatively mandated warning provided in section 1333 of the Act, the answers of Liggett Group, Philip Morris, and Lorillard each included a defense based on the preemptive effect of the Act. The Cipollones responded by filing a motion to strike the preemption defenses. Lorillard, later joined by Philip Morris, then moved for judgment on the pleadings pursuant to Federal Rule Civil Procedure 12(c). Holding that the Act preempted none of the Cipollones' claims, the district court granted the Cipollones' motion to strike the defenses and denied the motion for judgment on the pleadings. *Cipollone v. Liggett Group, Inc.*, 593 F.Supp. 1146, 1171 (D.N.J. 1984). On January 21, 1984, this court granted appellants Lorillard and Liggett Group permission to appeal.[1] Because we disagree with the district court's

1. Liggett Group petitioned for leave to appeal only from the portion of the district court's order granting the Cipollones' motion to strike defenses. *See* Joint Appendix at A205. Lorillard sought leave to appeal from the entire (Cont'd)

Appendix C

conclusion concerning the preemptive effect of the Act, we will reverse the district court's grant of the motion to strike and will remand the case for further proceedings.

I.

A. The Complaint

In their complaint, Rose and Antonio Cipollone alleged that Mrs. Cipollone developed lung cancer as a result of smoking cigarettes manufactured and sold by appellants. The complaint, which was originally filed on August 1, 1983, further averred that Mrs. Cipollone began smoking in 1942 and developed lung cancer as a result of her smoking. Mrs. Cipollone died in October 1984, but her husband has continued prosecuting this action, individually and as executor of his wife's estate. Mr. Cipollone is therefore the sole appellee in this case.

As observed by the district court, the fourteen-count complaint sets forth claims based on strict liability (Counts 2, 3, and 9), negligence (Counts 4 and 5), breach of warranty (Count 7), and intentional tort (Counts 6 and 8). The Cipollones claimed that the defendants' cigarettes were unsafe and defective (Count 2) and that defendants are subject to liability for their failure to warn of the hazards of cigarette smoking on the basis of negligence (Count 4) or strict liability (Count 3). In addition,

(Cont'd)
order, which included a denial of its motion for judgment on the pleadings. *See* Joint Appendix at A203. Nevertheless, both appellants made clear in their reply brief and at oral argument that they did not challenge the district court's denial of Lorillard's motion for judgment on the pleadings. *See* Reply Brief of Appellants at 3; Transcript of Oral Argument at 7, 18. We will therefore consider only the district court's grant of the motion to strike.

the Cipollones asserted, defendants negligently (Count 5) or intentionally (Count 6) advertised their products in a manner that neutralized the warnings actually provided, warnings made meaningless by the addiction created by cigarettes (Count 9). Finally, the complaint stated that the defendants ignored, failed to act upon, and conspired to deprive the public of medical and scientific data reflecting the dangers associated with cigarettes (Count 8).[2]

B. The Federal Cigarette and Advertising Labeling Act

The Federal Cigarette and Advertising Act, originally enacted in 1965, was a response to a growing awareness among members of federal as well as state government that cigarette smoking posed a significant health threat to Americans. The original Act required the following warning label on cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health." 15 U.S.C. § 1333 (1970). Congress changed this warning, by amendment to the Act in 1969, to the following: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." 15 U.S.C. § 1333 (1976).[3] The Act, as amended

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2. Counts 1 and 10 through 14 are not pertinent to this appeal.

3. In 1984, Congress replaced this warning with rotational warnings providing:

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.

(Cont'd)

in 1970, expressly stated the policy behind the required warning:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1982).[4]

(Cont'd)

> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333(a)(1) (Supp. II. 1984). The 1984 warning, however, has limited relevance here because the complaint contains no allegation that Mrs. Cipollone smoked cigarettes manufactured and sold by any defendant after 1981.

4. Congress amended paragraph one of section 1331 in 1984 by adding a reference to warning notices in cigarette advertisements. Paragraph one now

(Cont'd)

Appendix C

The Act also contains a preemption provision, which provides that

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334 (1982). Confronted with this provision, the district court did not question that the Act prohibits state legislatures from requiring a warning on cigarette packages that alters that provided in section 1333. Nevertheless, after a comprehensive analysis of the Act, the court concluded that section 1334 does not preempt state common law claims such as those that the Cipollones have asserted.

II.

A. Preemption Principles

The United States Supreme Court has identified several principles for ascertaining congressional intent to preempt state

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(Cont'd)
provides: "(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes. . . ." 15 U.S.C. § 1331(1) (Supp. II 1984).

Appendix C

authority. To begin, Congress may preempt state law by express statement. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Without the aid of express language, a court may find intent to preempt in two general ways. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). First, a court may determine that Congress intended "to occupy a field" in a given area

> because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Second, in those instances where Congress has not wholly superceded state regulation in a specific area, state law is preempted "to the extent that it actually conflicts with federal law." *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1982). The Court has stated that such conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248

(1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Finally, in applying these principles, a court must be mindful of the overriding presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981); *see also Rice*, 331 U.S. at 230, 67 S.Ct. at 1152.

B. Express Preemption

In applying these principles to the statutory scheme at issue here, we first express our agreement with the district court's conclusion that section 1334 does not provide for express preemption of the Cipollones' state common law claims. *See Cipollone*, 593 F.Supp. at 1154-55; *accord Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F.Supp. 1189, 1190 (E.D.Tenn. 1985); *Roysdon v. R.J. Reynolds*, No. 3-84-606, slip op. at 2 (E.D.Tenn. Dec. 11, 1985). Because we are constrained by the presumption against preemption, we cannot say that the language of section 1334 clearly encompasses state common law. We find support for this determination in Congress's failure to include state common law explicitly within section 1334, as it has in numerous other statutes.[5] Indeed, in the absence of a preemption provision

5. Examples of statutes that include a preemption provision explicitly encompassing state common law include 12 U.S.C. §§ 1715z-17(d), 1715z-18(e) (Supp. II 1984) (Domestic Housing and International Recovery and Financial Stability Act); 17 U.S.C. § 301(a) (Copyright Act of 1976); and 29 U.S.C. § 1144(a), (c)(1) (1982) (Employee Retirement Income Security Act of 1974).

It should be noted that just as Congress could have included a reference to preemption of state common law in section 1334, it also could have included

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encompassing state common law, the Supreme Court has relied generally on principles of implied preemption in evaluating whether a statutory scheme preempts state common law. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). Accordingly, we turn to examining whether congressional intent to preempt the Cipollones' claims may be inferred under the two general principles of implied preemption.

C. Implied Preemption

In pressing their implied preemption arguments in this appeal, each side relies extensively on the legislative history of the Act. As is often the case with legislative history, both sides have succeeded in gleaning passages that bolster their contrary positions. Although we find the legislative history to the Act informative, no materials have come to our attention that we deem wholly dispositive of the issue before us. Even more important, we find the language of the statute itself a sufficiently clear expression of congressional intent without resort to the Act's legislative history. *See Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 941, 51 L.Ed.2d 124 (1977).

Under the principles of implied preemption, we must first

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a "savings clause" explicitly preserving the continued vitality of state common law, such as that in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (1982). Thus, lack of reference to preemption of state common law in section 1334 has significance only because of the presumption against preemption.

determine whether Congress intended "to occupy the field" relating to cigarettes and health to the exclusion of state law product liability actions such as the Cipollones. Our examination of the Act leads us to agree with the district court's statements that "Congress . . . intended to occupy *a* field" and "indicated this intent as clearly as it knew how." *Cipollone*, 593 F.Supp. at 1164 (emphasis in original). Not only did Congress use sweeping language in describing the preemptive effect of the Act in section 1334, but it expressed its desire in section 1331 to establish "a comprehensive Federal program" in order to avoid "diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." *See Palmer v. Liggett & Myers Tobacco, Inc.*, 635 F.Supp. 392 (D.Mass. 1984) (Congress has preempted field with respect to cigarette labeling).

In determining the scope of this field, we observe that the Cipollones' tort action concerns rights and remedies traditionally defined solely by state law. We therefore must adopt a restrained view in evaluating whether Congress intended to supercede entirely private rights of action such as those at issue here. *See Rice*, 331 U.S. at 230, 67 S.Ct. at 1152; *Cipollone*, 593 F.Supp. at 1165-66; *see also Silkwood*, 104 S.Ct. at 623-24; *Florida Avocado Growers*, 373 U.S. at 143-44, 83 S.Ct. at 1211. In light of this constraint, we cannot say that the scheme created by the Act is "so pervasive" or the federal interest involved "so dominant" as to eradicate all of the Cipollones' claims. Nor are we persuaded that the object of the Act and the character of obligations imposed by it reveal a purpose to exert exclusive control over every aspect of the relationship between cigaretts and health. *See Banzhaf v. F.C.C.*, 405 F.2d 1082, 1089-91 (D.C.Cir. 1968), *cert. denied*, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969); *see also Southern Railway Co. v. Railroad Commission of Indiana*, 236 U.S. 439, 446-48,

35 S.Ct. 304, 305-06, 59 L.Ed. 661 (1915). Thus, we look to the extent to which the Cipollones' state law claims "actually conflict" with the Act to ascertain whether they are preempted.

The test enunciated by this court for addressing a potential conflict between state and federal law requires us "to examine first the purposes of the federal law and second the effect of the operation of the state law on these purposes." *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (in banc) (citing *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971)). As mentioned above, Congress has provided us with an explicit statement of the Act's purposes in section 1331. That statement reveals that the Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy. *See Banzhaf*, 405 F.2d at 1090. Moreover, the preemption provision of section 1334, read together with section 1331, makes clear Congress's determination that this balance would be upset by either a requirement of a warning other than that prescribed in section 1333 *or* a requirement or prohibition based on smoking and health "with respect to the advertising or promotion" of cigarettes. *See* 15 U.S.C. § 1334.

Having identified the purposes of the Act, we now must evaluate the effect of the operation of state common law claims on these purposes. In so doing, we accept the appellants' assertion that the duties imposed through state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines*, 312 U.S. at 67, 61 S.Ct. at 404; *see also Dawson v. Chrysler Corp.*, 630 F.2d 950, 962 (3d Cir. 1980) (liability under common law has the effect of imposing requirements), *cert. denied*, 450 U.S. 959, 101 S.Ct.

1418, 67 L.Ed.2d 383 (1981). As the appellants point out, several Supreme Court opinions reflect recognition of the regulatory effect of state law damage claims and their potential for frustrating congressional objectives. *See, e.g., Fidelity,* 458 U.S. at 156-59, 102 S.Ct. at 3024-25; *Chicago & North Western Transportation Co.,* 450 U.S. at 324-25, 101 S.Ct. at 1133-34; *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959).[6] Applying this principle, we conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act.

Based on the foregoing, we hold that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages[7] or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

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6. The district court noted that *Garmon* involved claims based on state statutes, rather than state common law. This distinction does not undermine the significance of *Garmon.* As the appellants argue, the central inquiry should be whether a state statute or common law rule providing for civil liability is regulatory in its effect. The *Garmon* Court ruled that a claim for compensation has a regulatory nature and therefore may be preempted by a federal regulatory scheme. *Garmon,* 359 U.S. at 247-48, 79 S.Ct. at 780-81.

7. *Accord Roysdon,* at 1190-91 (1985); *Roysdon,* slip op. at 3 (Dec. 11, 1985).

As appellants' counsel conceded at oral argument, it is not necessary at this stage of the litigation for us to identify which of the Cipollones' claims are preempted by the Act. Under 28 U.S.C. § 1292(b), we are obliged to address the order that was certified rather than the controlling question of law framed by the district court.[8] *Johnson v. Alldredge,* 488 F.2d 820, 822-23 (3d Cir. 1973), *cert. denied,* 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974); *see, e.g., Murphy v. Heppenstall Co.,* 635 F.2d 233, 235 n. 1 (3d Cir. 1980), *cert. denied,* 454 U.S. 1142, 102 S.Ct. 999, 71 L.Ed.2d 293 (1982). The district court's statement of the controlling issue appears to call for a definitive ruling on each of the Cipollones' claims. Nevertheless, we need only decide whether the district court's ruling striking appellants' preemption defenses should be affirmed or reversed.[9] Two principles counsel

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8. Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

9. In *Johnson,* we stated that section 1292(b) "does not speak of the court of appeals deciding a question certified by the district court. . . Since under the clear terms of section 1292(b), we are called upon not to answer the question certified but to decide an appeal, we do not find ourselves bound by the District Judge's statement of the issue." 488 F.2d at 822-23.

us to take such an approach. First, a court should avoid a holding of preemption that is premised on a merely potential conflict between state and federal law. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3298, 73 L.Ed.2d 1042 (1982). In addition, a court should not grant a motion to strike a defense unless the insufficiency of the defense is "clearly apparent." *See May Department Stores Co. v. First Hartford Corp.*, 435 F.Supp. 849, 855 (D.Conn. 1977); Wright & Miller, Federal Practice and Procedure § 1381, at 802 (1969). The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where, as here, the factual background for a case is largely undeveloped. *See id.* at 800-02.

Mindful of both of these principles, we deem it appropriate to reverse the order of the district court and remand the case for further development of the claims and theories of the parties. The district court will then be in a position to make informed and definitive rulings on which claims then in contention are preempted.

III.

For the foregoing reasons, we will reverse the order of the district court to the extent that it granted the Cipollones' motion to strike appellants' preemption defenses. We will also remand the case for further proceedings consistent with this opinion.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED SEPTEMBER 20, 1984

Rose CIPOLLONE and Antonio Cipollone,

Plaintiffs,

v.

LIGGETT GROUP, INC., Philip Morris Incorporated, and Loew's Theatres, Inc.,

Defendants.

Civ. A. No. 83-2864.

United States District Court,
D. New Jersey.

Sept. 20, 1984.

OPINION

SAROKIN, District Judge.

INTRODUCTION

Despite the growing evidence that cigarette smoking is indeed hazardous to one's health, as recognized in the warning mandated by Congress, a legislative decision has been reached not to prohibit it. Although that decision may be due in some measure to the ongoing medical dispute as to the risks involved, it is predicated to a large extent on economic considerations and the apparent willingness of millions of persons to continue smoking despite the known and unknown risks. Congress, in order to avoid another

Prohibition, has decided to permit the manufacture and sale of cigarettes to continue, but has attempted to assuage its critics by regulating the industry and requiring it to affix a warning to each package sold.

The legislative history of the Act here involved reflects a candid concern for the economy of the entire country if cigarette manufacturing were curtailed or eliminated. One would hope that those fiscal considerations were weighed against the costs of illness and death caused by cigarette smoking as well as the moral responsibility of protecting the young and future generations who have not yet begun to smoke.

In any event, that branch of the government which is charged with the responsibility of protecting the health and welfare of our society has determined that the cigarette industry shall be permitted to flourish after consideration of the consequences of permitting it to do so. This case presents the issue of whether cigarette manufacturers can be subjected to tort liability, if they have complied with the federal warning requirement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." In effect, the cigarette industry argues that compliance immunizes it from liability to anyone who has chosen to smoke cigarettes notwithstanding the warning, that the federal legislation has created an irrebutable presumption that the risk of injury has been assumed by the consumer. This court rejects that contention.

The clear purpose of the federal legislation was to establish a uniform warning which would prevail throughout the country. By so doing, cigarette manufacturers would not be subjected to varying requirements from state to state. However, the existence of the present federally mandated warning does not prevent an

individual from claiming that the risks of smoking are greater than the warning indicates, and that therefore such warning is inadequate. The court recognizes that it will be extremely difficult for a plaintiff to prove that the present warning is inadequate to inform of the dangers, whatever they may be. However, the difficulty of proof cannot preclude the opportunity to be heard, and affording that opportunity will not undermine the purposes of the Act.

Defendants' argument that the statute was intended to foreclose such claims is not borne out by either the language or legislative history of the Act. Simply stated, defendants contend that a cigarette manufacturer who utilizes the federal warning cannot be held liable in tort. Just as simply, that statement could have been incorporated into the statute, if that were the intention, but it was not. Before this court or any other court so cavalierly rejects fundamental principles of the common law, it should demand a much more definitive statement from Congress.

The information regarding disease from smoking is growing. Medical and scientific opinion is divided. The impact on the economy is a factor considered by Congress and may well have caused a compromise in the content of the warning. Even Congress, which once declared that cigarette smoking *"may be"* hazardous, now finds that it *"is"* hazardous. This court believes that an individual injured while the warning was that cigarette smoking "*may be* hazardous to your health" would have been able to prevail if he or she was able to prove that "cigarette smoking is [was] hazardous to your health." Today even some greater warning may be appropriate, and variations are now being considered. In any event, no one should be deprived by virtue of congressional compromise of the opportunity of proving that contention absent a clear showing that Congress intended that they be so precluded.

There are further claims asserted by plaintiff which likewise deserve their day in court. Thus, even if utilizing the federal warning relieves cigarette manufacturers of liability for failure to warn, the question remains whether they can be held liable for collateral efforts to neutralize or negate the effects of the warning. Efforts to convince the public that the risks do not exist or that they are minimal or unsupported by medical or scientific data may in and of themselves give rise to a cause of action; indeed they may even constitute a violation of the very statute which defendants brandish as a shield. Whether the present federally mandated warning is adequate and whether defendants have wrongfully attempted to neutralize that warning are thus issues which survive the federal statute and are not preempted by it.

Certainly, as in all such cases, the federal standard is strong evidence of the adequacy of the warning, but it is not conclusive. The federal government regulates many industries, not least of which is the ethical drug industry. The fact that the safety, efficacy, literature and warnings pertaining to drugs are reviewed and approved by the government pursuant to the authority of Congress has never relieved drug manufacturers of liability in tort if the risks exceeded the warnings given. These cases, among others, recognize that even the federal government is fallible. The fact that it finds a product safe or a warning adequate does not necessarily make it so. The private citizen should not be deprived of the opportunity to establish such fallibility and vindicate his or her rights to recover for injuries sustained if supported by competent proofs.

THE COMPLAINT

Plaintiff Rose Cipollone is dying of lung cancer. She brings this products liability action against three cigarette companies,

alleging that they are responsible for her current state. Her fourteen-count complaint sounds in strict liability (Counts 2, 3 and 9), negligence (Counts 4 and 5), intentional tort (Counts 6 and 8) and breach of warranty (Count 7). She claims that defendants have produced an unsafe and defective product (Counts 2 and 7), the risk of which outweighs its utility (Count 2), but have negligently (Count 4) or intentionally (Count 8) failed adequately to warn consumers of the hazards associated with cigarette smoking. *See also* Count 3 (strict liability for failure to warn). Indeed, she contends, defendants have negligently (Count 5) or intentionally (Count 6) advertised their products so as to neutralize and render ineffective those warnings actually given, warnings which are made meaningless in any event by the addicitive qualities of cigarettes (Count 9).[1]

Defendants have each answered, asserting as an affirmative defense, *inter alia*, that plaintiff's claims are preempted by the Federal Cigarette Labeling Act, as amended by the Public Health Cigarette Smoking Act, 15 U.S.C. § 1331 *et seq*. Plaintiff has moved to strike such defense. With the cross-motion of defendant Loew's Theatres, Inc. for judgment on the pleadings, the parties are now before the court on this difficult issue.

The Act

The Federal Cigarette Labeling and Advertising Act

Originally enacted in 1965, the Federal Cigarette Labeling and Advertising Act ("the Act") followed a report of the Surgeon

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1. Counts 10 through 13 contain allegations concerning the identities of various defendants. Count 14 comprises plaintiff Antonio Cipollone's claim for "loss of comfort, companionship and consortium. . ."

Appendix D

General of the United States concluding that cigarette smoking comprised a significant health hazard to Americans, warranting remedial action by Congress. As amended in 1970, the Act sets forth the following statement of policy:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. In order to effectuate these purposes, Congress provided that

> It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Such statement shall be located in a

Appendix D

> conspicuous place on every cigarette package, and shall appear in conspicuous and legible type in contrast by typograph, layout, or color with other printed matter on the package.

15 U.S.C. § 1333. The Federal Trade Commission was given the authority to regulate cigarette advertising, 15 U.S.C. §§ 1335-36, and the district courts jurisdiction to enjoin violations of the Act. 15 U.S.C. § 1339. A minimal criminal penalty was also provided. 15 U.S.C. § 1338.

Congress included within the Act a provision regarding preemption, and it is this provision which is now before the court for interpretation and application. Congress stated:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labelled in conformity with the provisions of this chapter.

15 U.S.C. § 1334. Plaintiff concedes that this section prohibits states from regulating cigarette packaging, and cigarette advertising by, for example, requiring a warning other than that set forth in the Act. She argues, however, that this provision does not preempt state common law claims such as those asserted by plaintiff.

Appendix D

Preemption

"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. From this simple mandate springs the doctrine of preemption, as first stated by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824):

> The nullity of any act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every case, the act of Congress, or the treaty, is supreme; and the law of the state though enacted in the exercise of powers not controverted, must yield to it.

22 U.S. at 210-11. *See also Fidelity Federal Savings & Loan Ass'n. v. De La Cuesta*, 458 U.S. 141, 152, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (preemption doctrine has its roots in the Supremacy Clause of the Constitution).

From *Gibbons v. Ogden* on, courts, have struggled with the

Appendix D

question of whether federal law preempts state action. The problem is "largely one of statutory construction," and therefore "cannot be reduced to general formulas." L. Tribe, *American Constitutional Law* at 377 (1978). However, certain principles are clear. First, federal law may *expressly* preempt state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983), citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Absent express preemption, federal law may nonetheless have an implied preemptive effect if Congres so intended, and indicated such intent by "occupying the field" in a particular area. Thus

> Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the objects sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, supra, 458 U.S. at 153, 102 S.Ct. at 3022; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); *cited in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, supra*, 103 S.Ct. at 1722. And, even if Congress has not entirely displaced state regulation over the matter in question, state law may nonetheless be preempted to the extent that it actually conflicts

with the federal law. Such conflict occurs where "compliance with both federal and state regulations is a physical possibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). *See generally Silkwood v. Kerr-McGee Corp.,* ____ U.S. ____, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Pacific Gas & Electric Co., supra,* 103 S.Ct. at 1722; *Fidelity Federal Saving & Loan Ass'n, supra,* 458 U.S. at 153, 102 S.Ct. at 3022. Together, these principles seek to accommodate the competing interests engendered by appropriate national regulation and the legitimate exercise of state power. Underlying any discussion of preemption, therefore, is the structural foundation of a federal system, in which state and federal regulation must co-exist. The preservation of that system requires a presumption "that Congress did not intend to displace state law", *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981), quoting *Rice v. Sante Fe Elevator Corp., supra,* 331 U.S. at 230, 67 S.Ct. at 1152; "preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 634, 101 S.Ct. 2946, 2962, 69 L.Ed.2d 884 (1981), quoting *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981); *Florida Lime & Avocado Growers, supra,* 373 U.S. at 142, 83 S.Ct. at 1217. Moreover, state law should be suspended "only to the extent of actual conflict with the scheme of federal regulation." *In re Quanta Resources Corp.,* 739 F.2d 912 at 915 (3d Cir. 1984), citing *Stellwagen v. Clum,* 245 U.S. 605, 613, 38 S.Ct. 215, 217, 62 L.Ed. 507 (1918).

Here, the preemption issues arises in the context of a claim that the Federal Cigarette Labeling Act preempts the state common law claims asserted by plaintiff. There is no question, as defendants argue, that common law is as susceptible of preemption as are state statutes or regulations for, as the Supreme Court has stated,

> regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959).[2] *See also Sperry v. Florida,* 373 U.S. 379, 403, 83 S.Ct. 1322, 1335, 10 L.Ed.2d 428 (1963) ("The authority of Congress is no less when the state power it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature.") Hence, courts have held that federal statutes have preempted state common law claims in many areas. *See e.g., Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 582-84, 101 S.Ct. 2925, 2932-33, 69 L.Ed.2d 856 (1981) (Natural Gas Act preempts calculation of damages under state common law of contract); *Kalo Brick, supra,* 450 U.S.

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2. It should be noted that the *Garmon* case did not involve the preemption of state common law claims, since the state courts had relied on various state statutory provisions in reaching the applicable decisions. 359 U.S. at 239, 79 S.Ct. at 776.

at 317-32, 101 S.Ct. at 1130-37 (Interstate Commerce Act regulation of abandonment of service preempts state tort claim); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 270-73, 94 S.Ct. 2770, 2774-75, 41 L.Ed.2d 745 (1974) (NLRA preempts certain state libel claims); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229-33, 84 S.Ct. 784, 787-89, 11 L.Ed.2d 661 (1964) (federal patent and copyright laws preempt state actions for unfair competition, at least in part); *Hodges v. Atchison, Topeka & Santa Fe Railway Co.*, 728 F.2d 414, 416-17 (10th Cir. 1984) (Railway Labor Act preempts state common law claim for wrongful discharge); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 199-201 (2d Cir. 1983) (Copyright Act preempts state common law claims for conversion and interference with contract); *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983) (Rehabilitation Act of 1973 preempts state contract claim); *Viestenz v. Fleming Companies, Inc.*, 681 F.2d 699, 701-04 (10th Cir.), *cert. denied*, 459 U.S. 972, 103 S.Ct. 303, 74 L.Ed.2d 284 (1982) (National Labor Relations Act preempts state actions for wrongful discharge and intentional infliction of emotional distress arising out of labor context); *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691, 694 (9th Cir. 1978) (National Labor Relations Act preempts state claims of defamation and business disparagement); *City of Chicago v. General Motors Corp.*, 467 F.2d 1262, 1265 (7th Cir. 1972 (National Emissions Standard Act preempts state products liability based upon automobile pollution); *Zittrouer v. Uarco Inc. Group Benefit Plan*, 582 F.Supp. 1471, 1477 (N.D. Ga. 1984) (ERISA preempts state tort claim for bad faith handling of benefits claim); *Delisi v. United Parcel Service, Inc.*, 580 F.Supp. 1572 (ERISA and NLRA preempt state common law claim for wrongful discharge); *Salcedo v. Norfolk & Western Railway Co.*, 572 F.Supp. 286, 288 (E.D. Mich. 1982) (Railway Labor Act preempts state law claims for emotional distress and intentional interference

with contractual relations); *Videotronics, Inc. v. Bend Electronics*, 564 F.Supp. 1471, 1476-77 (D.Nev. 1983) (Copyright Act preempts state common law claims of misappropriation and trade secret violations); *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Fund*, 563 F.Supp. 653, 658-59 (C.D. Calif. 1983) (ERISA preempts certain state common law claims for breach of contract), citing *Lafferty v. Solar Turbines International*, 666 F.2d 408 (9th Cir. 1982); *Huth v. B.P. Oil, Inc.*, 555 F.Supp. 191, 194 (D.Md. 1983) (Petroleum Marketing Practices Act preempts conflicting state common law claims), citing, *e.g.*, *Meyer v. Amerada Hess Corp.*, 541 F.Supp. 321, 332 (D.N.J. 1982) (same); *State of North Dakota v. Merchants National Bank and Trust Co.*, 466 F.Supp. 953 (D.N.D. 1979) (federal banking law preempts state common law of unfair competition). *See also City of Milwaukee v. Illinois*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (federal statute preempts federal common law). However, there remains a presumption against the preemption of state common law, in particular, since such law is often the result of many generations of judicial development, *see, e.g.*, *Iconco v. Jensen Construction Co.*, 622 F.2d 1291, 1296 (8th Cir. 1980), and, more importantly, concerns areas "traditionally regarded as within the scope of state superintendence." *Florida Avocado Growers v. Paul, supra*, 373 U.S. at 144, 83 S.Ct. at 1218. *See also Pacific Gas & Electric Co., supra*, 103 S.Ct. at 1723, quoting *Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at 230, 67 S.Ct. at 1152 ("Congress legislated here in a field which the States have traditionally occupied . . . so we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *Milwaukee v. Illinois, supra*, 451 U.S. at 316-17, 101 S.Ct. at 1792, citing *Jones v. Rath Packing Co.*, 430 U.S. at 525, 97 S.Ct. at 1309. *See generally* Tribe, *supra*, § 6-25 at 385-86. Torts, such as those alleged here, are precisely

the sort of legal action that falls within the scope of a state's historical and prototypical powers. *See, e.g., Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C. Cir. 1984); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 462, 479 A.2d 374 (Sup.Ct. of N.J. 1984).[3] The presumption against preemption of these causes of action is strengthened where preemption would leave a putative plaintiff without adequate remedy for violation of his or her state created rights. *See Silkwood v. Kerr-McGee Corp., supra*, 104 S.Ct. at 626. *See also id.* at 629 ("it is inconceivable that Congress

3. The cases involving labor law are instructive on this point. Generally, labor relations are a federal concern and, state laws conflicting with the NLRA are preempted. *See, e.g., San Diego Building Trades Council v. Garmon, supra*, 359 U.S. at 239-45, 79 S.Ct. at 776-79. However, the Supreme Court has carefully tailored the resulting preemption doctrine to take cognizance of the activities in which states have a "compelling . . .interest," *id.* at 247, 79 S.Ct. at 781, or which concern matters "so deeply rooted in local feeling or responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 244, 79 S.Ct. at 779. Hence, for example, the Court has carved out exceptions to the general preemption doctrine for "conduct marked by violence and imminent threats to the public order," *id.* at 247, 79 S.Ct. at 781 (citing cases) for certain defamation actions, *Old Dominion Branch No. 496, National Ass'n of Letter Carriers, supra*, 418 U.S. at 271-73, 94 S.Ct. 2770 at 2774-75, 41 L.Ed.2d 745, citing *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (allowing state defamation actions to the extent that published statements are made with knowledge of their falsity or reckless disregard for the truth), for actions for intentional infliction of emotion distress, *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), and for trespass actions. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). In each of these cases, the Court found the conduct addressed by state law to be beyond the scope of the NLRA, and thus of only peripheral concern to federal purposes, to be of a deeply felt concern of the states, and to pose little risk of state interference with the Act. *See e.g., Farmer, supra*, 430 U.S. at 298, 97 S.Ct. at 1062.

intended to leave victims with no remedy at all" (Blackmun, J., dissenting). However, any application of these principles inevitably requires the interpretation of a statute. *See* Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 Stanf.L.Rev. 208, 208-210 (1959). It is to such interpretation that the court now turns.

DISCUSSION

A. Express Preemption

The court first addresses the question of whether the common law causes of action here asserted by plaintiff are expressly preempted by the Act. Congress has preempted certain state action by the terms of 15 U.S.C. § 1334, which is entitled "Preemption," and does not allow any "statement relating to smoking and health, other than the statement required by Section 1333 . . ." to be "*required* on any cigarette package." 15 U.S.C. § 1334(a) (emphasis added). It likewise does not permit any "*requirement or prohibition* based on smoking or health" to be "imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (emphasis added). Indeed, plaintiff concedes that the Act "precludes state and government *regulation* of labeling and advertising." Plaintiff's Brief (2/24/84) at 4. *See also Id.* at 8, 18, 29. Nonetheless she argues that her claims, should they succeed, will not constitute regulation of cigarette labeling or advertising, but merely compensation for the harmful effects of smoking and thus, that they are not preempted. In support of this argument is the language of the statute, which does not, in so many words, prohibit suits against cigarette companies based upon state common law. Plaintiff argues, and the court agrees, that had Congress wished

to extinguish state causes of action, it could easily have done so.

Defendants contend that, as state tort law has a clear regulatory effect, it falls within the language of § 1334, and indeed might well act so as to undermine the Act's purposes of creating uniformity of effective cigarette labeling and advertising, and of assuring the continued viability of the tobacco industry. Like plaintiff, defendants argue based upon what does not appear in the Act, stating that had Congress wished to allow state common law causes of action to survive, it would have included a savings clause. Indeed, defendants complement their superb briefing with a thorough Appendix, including examples of fifty such clauses appearing in federal acts.

The court, however, is persuaded that, on its face, the Act does not explicitly preempt state common law claims, and that determination of the question of whether preemption was intended requires an analysis of the legislative history of the Act. It is true, as defendants argue, that Congress could have included a savings clause within the Act, as it did, for example, in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4). It did not. Nor, however, did Congress explicitly include state common law within the Act's preemption provision, as it did, for example, in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(c)(1).[4] The question is thus not one that can be

4. ERISA's preemption clause states that

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. . .

(Cont'd)

resolved through examining the expansiveness of the preemption

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29 U.S.C. § 1144(a). Later, it makes clear that

> For purposes of this section:
>
> (1) The term "State law" includes all laws, *decisions*, rules, regulations, or other State action having the effect of law, of any State. . .

29 U.S.C. § 1144(c)(1) (emphasis added). *See generally Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-16 (8th Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981). Similar provisions, specifically preempting state common law appear in other statutes as well, pertaining to both substantive, *see, e.g.*, 12 U.S.C. § 1715z-17(d), 1715z-18(c); 12 U.S.C. § 2259; 17 U.S.C. § 301(a); 25 U.S.C. §§ 1723(a)(1), 1753(d) (preemption of common law fraud claims only), and procedural provisions. *See, e.g.*, 5 U.S.C. §§ 7118(a)(6), 8124(b)(2); 22 U.S.C. § 4116(f); 33 U.S.C. § 923(a); 42 U.S.C. § 1988 (state common law procedures may be used in criminal cases to the extent consistent with the Constitution and laws of the United States). *See also* 25 U.S.C. § 1722(d) (defining "laws of the State" as including common law for purposes of the Maine Indian Claims Settlement Act of 1980). Hence, it is clear that, just as Congress could easily have provided a savings clause, so could it easily have explicitly preempted state common law. Indeed, in certain cases it did both. *See, e.g.*, 17 U.S.C. § 301; 25 U.S.C. § 1723(a)(1), 1753(d). Here, it did neither.

Moreover, to argue from the non-existence of a savings clause is not particularly persuasive, and flies in the face of the principle that "a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966) (*en banc*), *cert. denied*, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967). *See also Checkrite Petroleum, Inc. v. Amoco Oil Co.*, 678 F.2d 5, 8 (2d Cir. 1982) (citing cases). Indeed, one scholar has pointed out that the proper negative inference in cases such as these is precisely the opposite of that which defendants seek to have the court draw: "Because statutes in derogation of the common law are disfavored, the maxim *[of expressio unius est exclusio alterius]* has been extensively employed to *avoid* repeal of the common law . . ." Sands, 2A *Sutherland Statutory Construction* § 47.24, at 128 (1973) (emphasis added).

provision of the Act, on its face.[5]

Nor does the court find it sufficiently clear that state tort law is encompassed within the terms "requirement or prohibition" utilized in § 1334 to be *expressly* preempted by the Act. Whether or not the effect of such New Jersey tort law is a conflict with the Act rendering such state law *impliedly* preempted, a matter discussed in some detail, *infra* at 1166-1170, the court cannot find the terms "requirement or prohibition" expressly to abolish common law remedies such as those sought by plaintiff. It is true

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5. Indeed, even where savings clauses appear, they have often been narrowly construed so as to effectuate the purposes of a particular congressional enactment. *See, e.g., People of the State of Illinois v. City of Milwaukee,* 731 F.2d 403, 413-14 (7th Cir. 1984) (narrowly construing savings clause in Federal Water Pollution Control Act); *American Progressive Life and Health Insurance Co. of New York v. Corcoran,* 715 F.2d 784, 786-87 (2d Cir. 1983) (narrowly construing savings clause regarding insurance in ERISA); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979) (narrowly construing savings clause in Mineral Lands Leasing Act); *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1274-81 (5th Cir. 1978) (narrowly construing jurisdictional savings clause in Securities Exchange Act of 1934); *National Ass'n of Regulatory Utilities Commissioners of Coleman,* 542 F.2d 11, 13-15 (3d Cir. 1976) (narrowly construing savings clause in Federal Railroad Safety Act). *See also Head v. New Mexico Board of Examiners,* 374 U.S. 424, 444, 83 S.Ct. 1759, 1770, 10 L.Ed.2d 983 (1963) (Brennan, J., concurring) (a general savings clause "does not resolve specific problems. . .but its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable"), *cited in Lockheed Air Terminal, Inc. v. City of Burbank,* 457 F.2d 667, 675 (9th Cir. 1972) (finding of preemption "unavoidable" under Federal Aviation Act), *aff'd,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). *See generally, Note, supra,* 12 Stanf.L.Rev. at 211-15 (courts have paid "slight attention" to savings clauses); *Sands, supra,* § 47.24 at 128 (where "the policy and purpose of the statute indicate that the common law was intended to be superseded, and the wording of the statute is so complete that it reasonably appears to be exclusive" statute may preempt the common law).

that, as a secondary effect, tort actions may have some regulatory effect; this occurs because the primary and unquestionable effect of a finding of tort liability is to shift the "burden of losses" to "those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur." *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 379, 161 A.2d 69 (1960). Indeed, compensation is the very purpose of tort liability in this state and elsewhere. *See, e.g., O'Brien v. Muskin Corp.*, 94 N.J. 169, 179, 463 A.2d 298 (1983); *Michalko v. Cooke Color & Chemical Corp.*, 91 N.J. 386, 398, 401 A.2d 179 (1982); *Beshada v. Johns-Manville Product Corp.*, 90 N.J. 191, 205-06, 209, 447 A.2d 539 (1982); *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 173, 406 A.2d 140 (1979) ("Strict liability . . . is but an attempt to minimize the costs of accidents and to consider who should bear those costs."); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 65, 207 A.2d 305 (1965) (purpose of tort liability "is to insure that the cost of injuries or damage . . . resulting from defective products . . .is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.") *See also Cinnaminson Township Board of Education v. U.S. Gypsum Co.*, 552 F.Supp. 855, 857 (D.N.J. 1982), quoting *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 350, 431 A.2d 811 (1981) (". . . this court has long recognized the significance of the social policy of risk-spreading in establishing the manufacturer's duty to the product user under the rapidly expanding principles of strict liability in tort.") *See generally Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 701, 377 P.2d 897 (1962) (citing authorities); Prosser and Keeton, *The Law of Torts* § 1 at 5, § 4 at 20 (1984); Harper and James, *The Law of Torts* § 13.2 at 762-63 (1965). As defendants correctly contend, the imposition of tort liability may as a consequence, have a regulatory impact. Indeed, one purpose

of products liability law is "to motivate individuals in the context of commercial enterprise to invest in safety." *Michalko, supra,* 91 N.J. at 398, 401 n. 4, 451 A.2d 179; *Beshada, supra,* 90 N.J. at 206-07, 447 A.2d 539. *See also* Prosser and Keeton, *supra,* § 4 at 25-26. Whether that regulatory impact conflicts with the purposes of the Act is a matter of implied preemption, and will be discussed later. Whether such impact comprises regulation, that is, creates a "requirement or prohibition," raises the question of express preemption.

The court finds that it does not. Regulation implies that certain behavior be absolutely required or prohibited: thus, one may not run a red light, or under the Act, fail to produce a cigarette package without the warning required by § 1333, without risking criminal liability or injunctive sanctions. Such behavior is prohibited and, in that sense, regulated. Similarly, were the New Jersey Legislature to mandate that a different warning be placed on cigarette packages, it would be imposing a requirement and, in that sense, regulating; such statute would, of course, be expressly preempted by the Act. Tort liability, however, merely "motivates" a person or business entity to act or refrain from acting by creating certain financial incentives; failing to do so, however, may or may not subject one to recurrent tort liability, and cannot subject one to an injunction or to criminal penalties in the common law context.[6] Hence, the producer of a defective produce, who has

6. The federal courts have long held that there is no federal common law of crimes, *see, e.g., United States v. Best,* 573 F.2d 1095, 1101 (9th Cir. 1978), citing *Morissette v. United States,* 342 U.S. 246, 263, 72 S.Ct. 240, 249, 96 L.Ed. 288 (1952); *United States v. Coolidge,* 14 U.S. (1 Wheat.), 415, 4 L.Ed. 124 (1816); *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812). *See also United States v. Berrigan,* 482 F.2d 171, 185 (3d Cir. 1973); *Levy v. Parker,* 478 F.2d 772, 796 and n. 35 (3d Cir. 1973), *rev'd on other grounds,* (Cont'd)

been found liable in tort is put to a choice: it may avoid the risk of future liability by remedying the defect in its product or, at the extreme, by withdrawing such product from the market, or it may confront such risk, hoping that future juries, acting in light of different sets of facts, will find for it. Which course it takes depends upon a complex combination of economics, morality and psychology. In this sense, tort liability does not regulate at all; it merely creates some probability of changing the behavior of those upon whom it imposes liability, and without dictating the form of such change. *See generally Ferebee v. Chevron Chemical Co., supra,* 636 F.2d at 1541. What that probability is, and the form such behavioral change would take, provides a starting point for an analysis of whether a conflict exists between the imposition of state tort liability and federal legislation, here, the Act. However, the differences between regulation and motivation are such as to preclude a finding of express preemption. As the one scholar who has explored this particular question has written

> Courts adjudicate prior misconduct and require payment for injury. When a court imposes liability for failure to adequately warn, no specific "statement relating to smoking and health" is being required. The practical effect of this may be that cigarette companies will choose to add an addiction warning so as to avoid future liability. A damages award, however, requires only payment

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417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), and New Jersey agrees. N.J.S.A. 2C:1-5(a) ("Common law crimes are abolished and no conduct constitutes an offense unless the offense is defined by this code or another statute of this state.")

> —it is not an injunction requiring the defendant to incorporate into its advertising a fixed legend different from the federally required label. The labeling acts do not prohibit a manufacturer from warning of undisclosed health risks. The only prohibition is against a state agency passing a law requiring cigarette companies to use a different label.

D. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal,* 53 S.Cal.L.Rev. 1423, 1454 (1980) (footnote omitted).

The question of express preemption and the legal issues raised thereby ought not, under the principles enunciated *supra,* at 8-16, be resolved so as to displace traditional state common law remedies unless Congress' expression of its desire to do so is crystal clear. Congress' words reveal far less clarity: it did not expressly preempt the common law claims asserted here.[7]

B. Implied Preemption

As discussed earlier, the fact that plaintiff's common law claims are not expressly *preempted* does not end this inquiry.

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7. It should be noted that this section addresses only plaintiff's claims regarding failure to warn, Counts 3, 4 and 8, and deceptive advertising, Counts 5, 6 and 9. It does not address plaintiff's risk-utility allegation, contained in Count 2 and, to an extent, Count 7, of the complaint, because defendants do not contend that such claim is expressly preempted, but only that it is impliedly preempted as a result of conflict with the Act, Brief of Defendant Loew's Theatres, Inc. at 31-32, or because the Act has occupied the field. *Id.* at 32-33. Nor could defendants argue that this sort of claim has been expressly preempted, for language of the Act addresses only cigarette package labelling, on the one hand, 15 U.S.C. § 1334(a), and advertising or promotion, on the other. 15 U.S.C. § 1334(b).

Rather, such claims may be *impliedly* preempted if Congress so intended, and manifested such intent either by "occupying the field," or if plaintiff's claims implicate state law which "actually conflicts" with the Act. The question of implied preemption necessarily requires a careful examination of the legislative history of the Act.

Defendants rest their implied preemption arguments on three aspects of the legislative history of the Act. First, they state that Congress made it absolutely clear that the Act was not meant as a prohibition of cigarette manufacture, sale or use. Citing the legislative history, defendants point to congressional concern with the moral and economic effects of such a prohibition, as well as to evidence that cigarette smoking actually enhances psychological and social well-being. Second, defendants point to Congress' desire to enact a uniform national policy with respect to the relationship between smoking and health, in part in order to protect the aforestated values. And third, at oral argument, defendants contended that Congress intended that only the statement prescribed in § 1333 appear on cigarette packages; thus, they argue, no court may impose a greater duty to warn and, indeed, no cigarette company may voluntarily utilize a different warning.

Plaintiff counters that the legislative history assumes the continued existence of common law tort actions against cigarette companies, particularly in the area of products liability. Specific passages indicate debate over the effect of the warning mandated upon the defense of assumption of the risk but, plaintiff argues, thus indicate an acceptance of the existence of the common law suits in which such defense would be pled. Moreover, plaintiff contends, Congress could not have intended, and did not intend, to deprive prospective plaintiffs of the remedy at law here sought.

The parties support their contentions with persuasive statutory authority and legislative history. Hence, defendants rely upon the debate surrounding passage of the Act, noting that, despite the call-to-action that ensued upon issuance of the Surgeon General's January 11, 1964 report entitled "Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Services," Congress chose a moderate course. Fearing the intrusion on "our personal rights and liberties" of a prohibition of cigarettes, *Cigarette Labeling and Advertising: Hearings on H.R. 2248, 3014, 4007, and 4249 Before the House Committee on Interstate and Foreign Commerce,* 89th Cong., 1st Sess. 225 (1965) (statement of Emerson Foote, Chairman, National Interagency Council on Smoking and Health), Congress rejected the notion of, for example, an outright ban on manufacture and sale. *See also Hearings on H.R. 2248, supra,* at 24 (statement of Congressman Morris K. Udall ("The Constitution guarantees us all these great freedoms including the freedom to abuse our health and make fools of ourselves if we want to, and I do not intend to deprive people of these great freedoms."); *Hearings on H.R. 643, 1237, 3055, 6543 Before the House Committee on Interstate and Foreign Commerce,* 91st Cong., 1st Sess., 348 (1969) (statement of Dr. Sol R. Baker, Chairman, Committee on Tobacco and Cancer, American Cancer Society) (". . . we are against prohibition. Some of us lived through one era of prohibition, and we certainly would not like to see another. We feel that it is the individual's right to smoke if he decides to . . ."); H.Rep. No. 449, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S. Code Cong. & Adm. News 2350, 2352 (". . . the Committee believes that the individual must be safeguarded in his freedom of choice—that he has the right to choose to smoke or not to smoke . . ."). Indeed, it is even true that, in opting for a response to the Surgeon General's conclusion that "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant

appropriate remedial action," Congress heard testimony of the "significant beneficial effects of smoking primarily in the area of mental health." *Hearings on H.R. 2248, supra,* at 167, (statement of Rep. Horace R. Kornegay) quoting the Surgeon General's 1964 Report at 356. *See also id.* at 438-39 (statement of Fred S. Royster, Managing Director, Bright Belt Warehouse Association) ("There seems to be no doubt but that the use of tobacco in its various forms is relaxing, is enjoyable, and is conducive of a measure of contentment. . . It is possible that the relaxation and contentment and enjoyment produced by smoking has lengthened many lives."); *Hearings on H.R. 643, supra,* at 551 (statement of Joseph F. Cullman, III, Chairman of the Executive Committee, The Tobacco Institute); *id.* at 1008-09 (statement of Dr. Charles Hine, Clinical Professor of Pharmacology and Preventive Medicine, Univ. of California).[8] Most importantly, perhaps, Congress' choice of labeling as the appropriate response to the Surgeon General's conclusion that '[c]igarette smoking is associated with a 70-percent increase in the age-specific death rates of males" due to lung cancer, chronic bronchitis and emphysema, and cardiovascular diseases, *see* S.Rep.

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8. These considerations did not, however, appear in the Senate or House reports, or the Conference report in either 1965 or 1969. *See* S.Rep. No. 195, 89th Cong., 1st Sess. (1965); H.Rep. No. 449, 89th Cong., 1st Sess. (1965); H.Rep. No. 586, 89th Cong., 1st Sess. (1965) (Conference Report), U.S. Code Cong. & Admin. News 1965, p. 2350; S.Rep. No. 91-566, 91st Cong., 1st Sess. (1969); H.Rep. No. 91-289 91st Cong., 1st Sess. (1969); H.Rep. No. 91-897 91st Cong., 2nd Sess. (1970) (Conference Report), U.S. Code Cong. & Admin. News 1970, p. 2652. It is therefore not clear that these "beneficial effects" were actually considered by Congress. *See generally* Sands, *supra,* § 48.10 at 209 ("Although statements in the committee report as to the reason for or the nature and effect of the proposed law are freely used by the courts to determine the intent of the legislature, they have been more hesitant in resorting to similar statements made by committee members or other persons at the committee's hearings.")

No. 195, 89th Cong., 1st Sess. 2-3 (1965), quoting the Surgeon General's 1964 Report, was the result of economic considerations. Indeed, the Act, in its preamble, seeks explicitly to protect "commerce and the national economy . . . to the maximum extent consistent with this declared policy . . ." 15 U.S.C. § 1331(2)(A). Thus, in 1965, Congress heard repeatedly of the economic ramifications of its proposed actions on the tobacco industry, "clearly a vital sector in this country's economy." ***Hearings on S. 559 and S. 547 Before the Senate Committee on Commerce,*** 89th Cong., 1st Sess. 246 (1965) (statement of Bowman Gray, Chairman of the Board, R.J. Reynolds Tobacco Co.). *See also id.* at 396-97 (statement of Sen. Sam J. Ervin, Jr.); *id.* at 543-45 (statement of Fred S. Royster, Managing Director, Bright Belt Warehouse Association); *id.* at 638-39 (statement of Ziggy Lane, Field Coordinator, National Association of Tobacco Distributors); 111 Cong. Rec. 13897-98 (June 16, 1965) (statement of Sen. Bass); 111 Cong.Rec. 13914-15 (June 16, 1965) (statement of Sen. Ervin). For example, Congress heard that, at that time, cigarettes were smoked by over 70 million people, spending over $8 billion, of which $3.3 billion went to excise taxes, supporting 750,000 farm families, as well as 96,000 persons in manufacturing. In all, tobacco was American's fifth largest cash crop, and accounted for $405 million in exports. These statistics had become more impressive by 1969, when Congress again took up the issue, ultimately resolving to strengthen the Surgeon General's warning. *Hearings on H.R. 643, supra,* at 25-26 (statement of Rep. John L. McMillan), 42-43 (statement of Reps. Richardson Preyer and Wilmer D. Mizell), 61-63 (statement of Rep. W.M. Abbitt), 64 (statement of Rep. William H. Natcher), 604-05 (statement of Robert W. Scott, Governor of North Carolina); 115 Cong.Rec. 16189-91 (June 17, 1969) (statement of Rep. Edwards), 115 Cong.Rec. 16193-94 (June 17, 1969) (statement of Rep. Fountain); 115 Cong.Rec. 16294 (June 17, 1969) (statement of Rep. Abbitt).

In light of these facts, Congress chose to attack the health problems associated with cigarette smoking not by virtue of a tobacco prohibition, but through a labeling requirement, made stronger in 1969 so as to be more effective. *See* S.Rep. No. 91-566, *supra,* at 2664; H.Rep. No. 91-289, *supra,* at 5.

Defendants are thus correct that Congress did not intend, by passing the Act, to eradicate the tobacco industry and did not expect to abolish cigarette smoking. They are also correct that Congress viewed this goal as being furthered by the preemption provision of the statute, which would serve to eliminate "diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health," 15 U.S.C. § 1331(2)(B), and to establish "a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. (Congressional declaration of policy and purpose). Indeed, the preemption provision of the Act, and the policy which underlies it, grew out of a concern that various states and localities would enact conflicting laws and ordinances.

> Some of the bills now pending before State legislatures would require a warning notice in cigarette advertisements appearing in periodicals published within the State. Others would require a health warning in cigarette commercials broadcast on a TV or radio station located within the State. The proposed form of the required caution notice varies from State to State.
>
> As a practical business matter, it would be almost impossible for any manufacturer to comply with

all of these differing and conflicting State and local laws

. . .

If Congress does not extend [§ 1334], there will be piecemeal and conflicting Federal and State regulations in this field. There will be litigation. And there will be enormous confusion and uncertainty. These are precisely the considerations which prompted Congress in 1965 to preempt this matter.

Hearings on H.R. 643, supra, at 554 (statement of Joseph F. Cullman, III). Indeed, congressional action in 1965 was directed at avoiding the "maze of conflicting regulations" which would have resulted had Congress not acted in this area, 111 Cong.Rec. 13901 (June 16, 1965) (statement of Sen. Moss). *See* S.Rep. No. 195, *supra,* at 4; H.Rep. No. 449, *supra,* at 2352. And, in 1969, Congress looked back at what it had done and, apparently saw itself as having "fended off efforts by regulatory agencies, individual state governments, and local governments in some cases to invade its jurisdiction." *Hearings on H.R. 643, supra,* at 16 (statement of Rep. Carl D. Perkins). *See also* 115 Cong.Rec. 16299 (June 18, 1969) (statement of Rep. Preyer). Rejecting the argument that states, or their subdivisions, ought to be able to "alert their own citizens to the dangers of smoking," *Hearings on H.R. 643, supra,* at 288 (statement of John F. Banzhaf, III, Executive Trustee, Legislative Action on Smoking and Health), *see also* H.Rep. No. 91-289, *supra,* at 33 (minority views of Reps. Jarman, Dingell and Adams), Congress clarified and continued the preemption provisions then in effect. *See* S.Rep. No. 91-556, *supra,* reported in 1969 U.S.Code Cong. & Adm.News 2652, 2663; H.Rep. No. 91-289, *supra,* at 4, 7, 9. Both in 1965, and again

in 1969, Congress spoke of its actions in the language of preemption. Thus, for example, Senator Morton stated that "[t]he problem of smoking and health is national in scope. It is clearly one in which Congress should occupy the the field." 111 Cong.Rec. 13930 (June 16, 1965). Senator Magnuson, Chairman of the Senate Commerce Committee, apparently agreed

> I think that all of us, or at least speaking for myself, are in general agreement . . . that if this matter is to be attended to, that it should be on a Federal level rather than a local or State level.
>
> This is for very practical reasons, along with other reasons. If there is one product that is completely in interstate commerce it is tobacco.
>
> It is grown in very few states and shipped all over to every State in the Union, every country in the world and, therefore, it would make it highly impractical and I think a burden on interstate commerce in this field should you have all kinds of regulations in various states.

Hearings on S. 559, supra, at 254. *See also id.* at 548. And, in 1969, Congressman Fountain argued:

> . . . all of us are mindful of the fact that there are certain areas in which the national interest is so paramount—where individual state laws might so jeopardize the national interest—that preemption is necessary; and in my opinion the problem here and the facts are so obvious—with every state and probably many municipalities

> passing different regulations requiring the manufacturers of cigarettes to have different labels on packages going into different states and areas—that the situation would become intolerable and so confusing and so frustrating to all concerned that the entire tobacco industry might be destroyed. For these reasons I believe in the doctrine of preemption in this case.

Hearings on H.R. 643, supra, at 30.

From these, and other, statements, defendants glean a congressional intent to preempt a field which includes the common law claims here asserted. They bolstered this assertion at oral argument by asserting that Congress intended that only the warning set forth in § 1333 be permitted to appear on cigarette packages; hence, a cigarette manufacturer found liable would not be permitted to escape such liability by altering its behavior, a result which, they claim, could not have been intended by Congress. In support of this position, defendants cite to congressional concern that the labeling requirement include a concise statement:

> Such cautionary statement should be short and direct, and should not be weakened in its impact by any qualifying adjectives such as "excessive," "continual," or "habitual." To this end, the committee had concluded that the following factual and succinct statement should now be prescribed: "Caution: Cigarette smoking may be hazardous to your health."

S.Rep. No. 195, *supra,* at 4. Consistent with such concern, the 1969 amendments to the Act changed the warning to: "Caution:

The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." 15 U.S.C. § 1333. In so doing, and thereby lengthening the warning, Congress opted for a shorter warning than that proposed by the House, which had required a label stating "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health and May Cause Lung Cancer or Other Diseases," but longer and more equivocal than that proposed by the Senate, *i.e.*, "Warning: Cigarette Smoking Is Dangerous to Your Health." *See* H.Rep. No. 91-897, *supra,* at 5 (Conference Report). Defendants do not, however, point to any passages stating explicitly that cigarette manufacturers would violate the Act by including a statement in addition to that prescribed in § 1333. Nor is the language of the Act to that effect.

Plaintiff recognizes the arguments proffered by defendant, responding simply, that Congress not only did not explicitly preempt state common law claims, but assumed their continued existence. In support of this argument, plaintiff also quotes extensively from the legislative history. It is true, as plaintiff argues, that discussions of preemption are silent as to the common law; it is also true that they focus upon executive or legislative regulation. First, congressional concern regarding preemption have, as plaintiff indicates, consistently been voiced without mention of the common law, and not even in terms of regulation in general, but of "laws" or "regulations" implying particular executive or legislative enactments. *See, e.g., Hearings on S. 559, supra,* at 246, 548 (statement of Bowman Gray, Chairman of the Board of R.J. Reynolds Tobacco Co.) ("It would be intolerable if the states . . . were to remain free to pass conflicting laws or to impose conflicting regulations on this subject."); *Hearings on H.R. 643, supra,* at 30 (discussing "laws" and "regulations"); *id.* at 554 (same, discussing "bills pending before State

legislatures"); S.Rep. No. 195, *supra,* at 4 (discussion "a multiplicity of State and local regulations"); H.R.Rep. No. 449, *supra, cited in* 1965 U.S.Code Cong. & Adm.News, *supra,* at 2352 (same). Moreover, in arguing for the extension of the preemption provision in 1969, Representative Preyer of North Carolina addressed the amendment which that year altered such provision so that it no longer applied as previously to federal agencies. *See* 15 U.S.C. §§ 1335-36.

> . . . that amendment speaks only to a ban on cigarette advertising by the FCC. It does not cover any other Federal agency and, more importantly, it does not cover such a ban if adopted *by each states legislature or local governing body.*

115 Cong.Rec. 16299 (June 18, 1969) (emphasis added). *See also Hearings on H.R. 643, supra,* at 610 (statement of Rep. Satterfield) (discussing federal, state and local "administrative and executive agencies"). And, perhaps most significantly, Representative Udall, in criticizing the bill ultimately passed in 1965 as one that "should be entitled, 'A bill for the relief and protection of the tobacco industry,' " listed as separate problems with the bill—which he labeled Hookers No. 1 and No. 2—its preemptive effect on "state and local government," and the extent to which it "protects [the cigarette manufacturers] against lawsuits by cigarette users," by undermining the assumption of the risk defense. 111 Cong.Rec. 16546 (July 13, 1965). Were these problems linked, he would certainly have discussed them together; that he did not demonstrates the inapplicability of the preemption clause to common law actions. It thus appears that Congress, initially acting in fear of certain state legislative action, *see supra,* at 30, continued to contemplate regulation by legislative or administrative processes as the subject of the preemption provisions of § 1334. *See generally*

Garner, *supra,* 53 S.Cal.L.Rev. at 1453-54.[9]

That common law claims were not intended for preemption is still clearer when viewed in terms of certain specifics of the congressional debate and, as defendants urge, within the historical context of that debate. *See* Brief of Defendant Loew's Theatres, Inc. at 12 (citing cases). Prior to passage and then amendment of the Act, products liability cases based upon state common law had, in fact, been brought against cigarette companies. *See, e.g., Green v. American Tobacco Co.,* 304 F.2d 70 (5th Cir. 1962),

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9. Defendants' arguments to the contrary are sparse. Defendant Liggett Group quotes Senate Report No. 91-566 as stating that the Act "prohibits health-related regulation or prohibition of cigarette advertising by any State or local authority." In reality, the 1969 Act clarified the previous preemption provision by making "it clear that the term 'State' includes any political division of any State." *Id.,* cited in 1970 U.S. Code Cong. & Admin. News 2652, 2663. And rather than stating the proposition cited in Liggett's brief, that Report actually states: "This preemption is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of the State." *Ibid.* Thus limited to legislative and executive action, this statement provides potent support for plaintiff's position.

Defendants are thus left to rely upon the singular statement of Rep. Bolling: "This preempts the right of any entity, of any government, to decide for itself . . . ." 111 Cong. Rec. 16545 (July 13, 1965). In addition to the fact that this statement was immediately followed by remarks of Rep. Springer indicating the continued existence of common law suits, *see infra* at 38, remarks for which Rep. Bolling thanked Rep. Springer, the court notes that defendants should heed their own admonition: the remarks of a single legislator should "rarely . . . be taken as final." Brief of Defendant Loew's Theatres, Inc. at 21 n. 12, citing *Schiaffo v. Helstoski,* 492 F.2d 413, 428 (3d Cir. 1974). This is especially so where these remarks are uncharacteristic of congressional debate in general. *Ibid.* Here, Rep. Bolling may well have been making clear that which was clarified in 1969—that the preemption provision applied to "any government," including that of a locality.

question certified on rehearing, 154 So.2d 169 (Fla.), *rev'd and remanded,* 325 F.2d 673 (5th Cir. 1963), *rev'd and remanded on rehearing,* 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam,* 409 F.2d 1166 (5th Cir. 1969) (*en banc*), *cert. denied,* 397 U.S. 911, 90 S.Ct. 912, 25 L.Ed.2d 93 (1970) (implied warranty of fitness for use under Florida law); *Ross v. Philip Morris & Co.,* 328 F.2d 3 (8th Cir. 1964) (implied warranty of fitness for use under Missouri law); *Lartigue v. R.J. Reynolds Tobacco Co.,* 317 F.2d 19 (5th Cir.), *cert. denied,* 375 U.S. 865, 84 S.Ct. 137, 11 L.Ed.2d 92 (1963) (implied warranty of fitness under Louisiana law), *cited in Hudson v. R.J. Reynolds Tobacco Co.,* 427 F.2d 541 (5th Cir. 1970); *Pritchard v. Liggett & Myers Tobacco Co.,* 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing,* 350 F.2d 479 (3d Cir. 1965), *cert. denied,* 382 U.S. 987, 86 S.Ct. 549, 15 L.Ed.2d 475 (1966), *modified,* 370 F.2d 95 (3d Cir. 1966), *cert. denied,* 386 U.S. 1009, 87 S.Ct. 1350, 18 L.Ed.2d 436 (1967) (warranty of fitness for use and negligent failure to warn, under Pennsylvania law); *Cooper v. R.J. Reynolds Tobacco Co.,* 234 F.2d 170 (1st Cir. 1956), *on remand,* 158 F.Supp. 22 (D.Mass. 1957), *aff'd,* 256 F.2d 464 (1st Cir. 1958) (fraud under Massachusetts law); *Albright v. R.J. Reynolds Tobacco Co.,* 350 F.Supp. 341 (W.D.Pa. 1972), *aff'd mem.,* 485 F.2d 678 (3d Cir. 1973), *cert. denied,* 416 U.S. 951, 94 S.Ct. 1961, 40 L.Ed.2d 301 (1974) (products liability action under Pennsylvania law).[10] And, although neither the statute itself

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10. *Albright* was filed on July 5, 1962. *See* Garner, *supra,* 53 S. Cal. L. Rev. at 1423 n. 3.

It should be noted that these cases address the problems of labeling and advertising under the aegis of breach of warranty, negligence or fraud causes of action. *See, e.g., Pritchard v. Liggett & Myers, supra,* 295 F.2d at 299-300. Indeed so intertwined is labeling or advertising with any tort causes of action based upon design defects, that the position of defendants Philip Morris and

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nor the final committee reports explicitly address the status of these cases after passage of the Act, congressional debate recognized their continued existence. Often, such recognition took the form of discussion as to the effect of the required warning on the defense of assumption of the risk. Thus, in 1965, Congressman Fascell of Florida expressed his view that

> The legislative record makes it clear that passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of "assumption or [sic] risk" and the legal requirement for such a defense to prevail; nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user.

111 Cong.Rec. 16543-16544 (July 13, 1965). Later, Congressman Fascell clarified his position. In response to Congressman Bolling's opposition to the preemption provisions of the Act, Mr. Fascell stated:

> There might be one consoling factor in the adoption of the conference report. By virtue of the language being required as a result of the law, it would raise the presumption that every company that makes and distributes this process does so with

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Liggett Group, that the Act permitted all tort actions except those based upon labeling and advertising is absurd. *See* Brief of Defendant Philip Morris at 27-28; Brief of defendant Liggett Group at 31-32. Labels and advertisements constitute a manufacturer's public statements about its product; they are a necessary component of any common law tort analysis.

> knowledge. If that is true, it would redound to the benefit of a plaintiff bringing an injury suit.

111 Cong.Rec. 16545 (July 13, 1965). Congressman Fascell thus believed that the warning would ultimately help plaintiffs in cases such as these. *See also* 111 Cong.Rec. 16546 (July 13, 1965) (statement of Rep. Udall). Theodore Ellenbogen, Acting Assistant General Counsel of the Department of Health, Education, and Welfare, testifying before the House Committee on Interstate and Foreign Commerce, disagreed.

> MR. MACKAY: I would like to ask you this as a lawyer. Would not the presence of the type of warning suggested in these bills greatly strengthen the hand of a defendant in a tort case?
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> MR. ELLENBOGEN: In the long run it might do so, because those cases that I have read—and I have not made a real study of this particular thing—but the *Green* case, for example, is based, I believe, on the implied warranty of fitness, and there being no notice of the health hazard to the consumer.

Hearings on H.R. 2248, supra, at 176. In response to Representatiave Mackay's further inquiries on this topic, a memorandum was supplied to the Committee, reviewing the caselaw, and concluding, as follows:

> Assuming a clear statement, suits based on negligence probably would be barred on three grounds. Having warned the buyer, the manufacturer could not be said to be negligent;

> the buyer is contributorily negligent in using a product he knows might harm him; and having been warned the buyer assumes the risk attendant to the use of the cigarettes . . . actions based on breach of warranty would probably be unsuccessful. When a seller warns a buyer of the possibility of a certain form of injury, it cannot be said that he is warranting that the injury will not occur.

Id. at 178.

Again in 1969, the House Committee on Interstate and Foreign Commerce considered this point at great length. Committee members attempted to show that the tobacco industry's support of the warning then in effect was as a result of the benefits it gained from the undermining of the assumption of the risk defense. *Hearings on H.R. 643, supra,* at 577-78 (colloquy between Rep. Moss and Joseph F. Cullman, III), 579-81 (colloquy between Rep. Dingell and Mr. Cullman), 589 (Colloquy between Rep. Thompson and Mr. Cullman), 589 (colloquy between Rep. Satterfield and Mr. Cullman). Representative Watson disagreed. *Id.* at 579, 582. However, both in 1969, and previously in 1965, all parties assumed the existence of lawsuits such as the instant one. Indeed, the congressional debate as to the validity of certain defenses presupposes such suits. Thus, Congressman Watson was correct when he stated that "nowhere in the Act of 1965 does it preclude an individual or prevent an individual from pursuing a common-law liability, as far as I know . . . ." *Id.* at 579. In fact, in 1965, the Department of Health, Education, and Welfare considered such suits to be "a private matter . . . not regulated by this bill . . . ." *Hearings on H.R. 2248, supra,* at 176 (statement of Theodore Ellenbogen).

The legislative history thus supports plaintiff's position in these respects.[11] Such position is further strengthened by the structure of the statute ultimately passed: although injunctive relief is available if sought by the government, 15 U.S.C. § 1339, and minimal criminal sanctions applicable to violations of the Act, 15 U.S.C. § 1338, the statute is silent as to damage claims. Absent the existence of common law claims such as those asserted by plaintiff, victims of cigarette smoking would thus be left with no remedy at all, a result which is "inconceivable," *Silkwood v. Kerr-McGee Corp., supra,* 104 S.Ct. at 629 (Blackmun, J., dissenting), especially in light of the existence of such claims prior to passage of the Act. Nonetheless, such claims might be preempted notwithstanding this legislative history if it were found either that Congress "occupied the field" or that the existence of such claims creates an actual conflict with the Act. It is these concerns that the court next addresses.

1. Did Congress preempt state common law claims by occupying the field?

As the court has noted earlier, preemption implied from legislative intent may be inferred where Congress "occupied the

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11. It also supports plaintiff's position with respect to the "addiction theory" of Count 9 and the advertising claims of Counts 4 and 5 of plaintiff's complaint. It is true that Congress chose not to address the addiction problem, despite the presentation of "a great deal of scientific testimony" regarding the issue. *See* Brief of Defendant Lowe's Theatres, Inc. at 27, citing legislative history. Nor, however, did it distinguish claims based upon addiction from the others which it chose not to preempt. *See* Garner, *supra,* 53 S. Cal. L. Rev. at 1453-54. Similarly, congressional inaction regarding the recognized dangers associated with cigarette advertising and promotion, *see id.* at 29, citing legislative history, ought not be construed as forbidding damage claims for injuries caused by such advertising and promotion, if such causation can be proved.

field" in a given area. Whether Congress did so may, in turn, be inferred in any of three ways: first, if there is a pervasive scheme of federal regulation in such area; second, if the federal interest in such area is dominant; and third, if the objective of federal law in such area and the obligations imposed by it reveal the same purpose. *See supra* at 1150. Defendants argue that Congress explicitly intended to preempt the field and that, in debate and elsewhere, it demonstrated such intent explicitly and by creating a pervasive scheme of federal regulation to deal with a problem uniquely federal in scope. The court disagrees.

It is true that at least one Senator stated that "[t]he problem of smoking and health is national in scope. It is clearly one in which congress should occupy the field." 111 Cong.Rec. 13930 (June 16, 1965) (statement of Sen. Morton). Other Senators, Representatives and delegates from the tobacco industry, the executive branch, and public interest groups agreed that federal regulation was necessary, in order to avoid a "maze of conflicting regulations" and deal with "a product that is completely in interstate commerce." *See supra* at 1159. Hence, Congress passed a bill purporting "to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331.

The court agrees that Congress thus intended to occupy a field and that it indicated this intent as clearly as it knew how. It utilized the language of preemption; it stated that it was establishing a pervasive scheme of regulation; and it discussed the dominant federal interest in the fields affected by its intended regulation. *See, e.g.,* H.Rep. No. 449, *supra,* at 2351-52 ("The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising

and manufacturing industry, and the numerous businesses which market tobacco products, are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States."); 111 Cong.Rec. 14,423 (June 22,1965) (statement of Rep. Harris) (". . .this is an interstate problem.") However, the legislative history of the Act, as well as its language, persuades the court that the field it occupied does not encompass the common law products liability claims here asserted. That field was expressly limited to "cigarette labeling and advertising with respect to any relationship between smoking and health," 15 U.S.C. § 1331; the preemption provision of the Act proscribes state or local action that would *require* a particular statement on cigarette packages, 15 U.S.C.§ 1334(a), or impose any "requirement or prohibition" with respect to cigarette advertising. 15 U.S.C. § 1334(b). Congress addressed itself to a problem national in scope, and in 1965, and again in 1969, chose to remedy that problem by requiring certain labeling, and regulating advertising, and finally making it "unlawful . . . on any medium of electronic communications subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. § 1335. It did not, however, address itself to the problem of compensating the victims of cigarette smoking and/or imposing civil liability on cigarette companies. Indeed, the issues are within a different field, that of products liability, the continued existence of which was assumed by Congress, and left for the states. Especially because "federal occupation of a field will not be lightly inferred," Tribe, *supra,* § 6-25, at 384 (citing cases), the fact that two different areas are thus implicated renders preemption improper. *See, e.g., Silkwood v. Kerr-McGee Corp., supra,* 104 S.Ct. at 622-26 (Price-Anderson Act does not preempt state tort law remedies); *Pacific Gas and Electric, supra,* 103 S.Ct. at 1726

(Atomic Energy Act leaves to the states traditional powers to regulate utilities); *Sears-Roebuck & Co. v. San Diego County District Council of Carpenters, supra,* 436 U.S. at 194-97, 98 S.Ct. at 1756-57 (cases relating to labor relations are not preempted if "different from" those presented to the National Labor Relations Board); *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 336, 93 S.Ct. 1590, 1597, 36 L.Ed.2d 280 (1973) (Water Quality Improvement Act does not preempt state common law claims for damages for oil spillage); *Huron Cement Co. v. City of Detroit,* 362 U.S. 440, 445, 80 S.Ct. 813, 817, 4 L.Ed.2d 852 (1960) (Detroit ordinance had different purposes from, and therefore is in a different field than congressional enactments concerning shipping). That the areas are similar begins rather than ends the inquiry; where Congress limits the scope of its enactment and manifests its intent not to interfere with areas beyond that scope, the preemptive effect of such enactment must be similarly proscribed. *See generally Pacific Gas & Electric, supra,* 103 S.Ct. at 1726 ("When the federal government completely occupies a given field or an identifiable portion of it . . . the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' "), quoting *Rice v. Santa Fe Railroad Corp., supra,* 331 U.S. at 236, 67 S.Ct. at 1155. Admittedly, the areas addressed by plaintiff's complaint, and those within the scope of the Act are related. Cigarette labeling and advertising are at issue in plaintiff's complaint, and the form they take may be affected by this lawsuit, if successful. However, as it did with respect to the Price-Anderson Act and, more explicitly, the Water Quality Improvement Act, Congress, in enacting the Federal Cigarette Labeling Act, intended only that states be precluded from regulating cigarette labeling and advertising. Compensation is, as the court has noted elsewhere, an entirely different matter. *See supra* at 1155-1156. The legislative history demonstrates that Congress assumed that, in appropriate

cases and where liability could be proven, such compensation would be paid, though such cases had failed in the past. It limited the scope of the Act, and especially of the preemption provision to that which it feared would interfere with the operation of the Act, and the health of the tobacco industry—state or local regulation, by statute, ordinance or other official legislative or executive enactment. It correspondingly limited the obligations imposed and the remedies available under the Act to those consonant with this purpose; a particular label was required, 15 U.S.C. § 1333, advertising was regulated, 15 U.S.C. § 1334-35, and reports were called for. 15 U.S.C. § 1337. Only the government can enforce the statute, by criminal prosecution or injunction. 15 U.S.C. § 1338-39.[12] Products liability standards

12. However, Congress did not create a particularly pervasive or comprehensive regulatory system when enacting the Cigarette Labeling Act. *See* Tribe, *supra*, § 6-25 at 385 (where a multiplicity of federal regulations govern a given field, the pervasiveness of the regulations will help to sustain a conclusion that Congress intend to exercise exclusive control over the subject matter), citing *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 296, 91 S. Ct. 1909, 1922, 29 L.Ed.2d 473 (1971); *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 75 S.Ct. 191, 99 L.Ed. 68 (1954). *See also Fidelity Federal Savings & Loan Association, supra*, 458 U.S. at 153, 102 S.Ct. at 3022. *But see New York Department of Social Services v. Dublino*, 413 U.S. 405, 415, 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688 (1973) (rejecting the contention that "preemption is to be inferred merely from the comprehensive character" of the provisions at issue), *cited in Motor and Equipment Manufacturers Association, Inc. v. E.P.A.*, 627 F.2d 1095, 1107-08 and n. 20 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952, 100 S.Ct. 2917, 64 L.Ed.2d 808 (1980). Here, while defendants are correct that Congress has evinced continuing interest in the area of cigarette smoking, *see* Brief of Defendant Loew's Theatres, Inc. at 33-34, regulation of the area has been considerably less pervasive than in such areas as labor law, interstate trucking and banking, in which preemption was found to exist, or in welfare, the environment, or even nuclear power, in which such preemptive effect has been limited or denied. *See supra* (cases cited in this note); *Silkwood, supra; Pacific Gas & Electric, supra.*

are thus left to the states, and mention of the corresponding private rights of action and damage remedies available to individuals is omitted from the Act. *See generally Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at 230, 67 S.Ct. at 1152 (field preempted by federal statute determined, in part, by objective thereof) (citing cases); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, supra*, 418 U.S. at 271, 94 S.Ct. at 2774 (field preempted by federal statute determined, in part, by remedies available thereunder). These private rights of action and private remedies, traditionally governed by state law, ought not, therefore, be assumed to be eradicated by the Act. *See Rice, supra*, 331 U.S. at 230, 67 S.Ct. at 1152. Congress did not intend that they be, and this court will not render them so.

2. Does state tort law conflict with the Act?

As in *Silkwood*, the question of preemption here turns ultimately "on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." 104 S.Ct. at 626. *See also Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., supra*, 450 U.S. at 317-18, 101 S.Ct. at 1130. As noted above, a conflict occurs either where compliance with state and federal law is a "physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See supra*, at 1151. However, in general, conflicts ought not lightly be inferred. As the Supreme Court has recently stated, in a diferent context:

> The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not

> preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

Rice v. Norman Williams Co., 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed.2d 1042 (1982) (citing cases). Implicitly utilizing this standard, the one federal court that has construed the preemption provision of the Act refused to find a conflict between the goal of uniformity, as embodied therein, and FCC regulation of television broadcasts regarding cigarettes. *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1090-91 (D.C.Cir. 1968), *cert. denied*, 396 U.S. 842, 90 S.Ct. 51, 24 L.Ed.2d 93 (1969) (Bazelon, C.J.).[13] Nonetheless, the question of whether or not New Jersey common law of products liability conflicts with the Act is one of first impression.[14]

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13. The one scholar that has examined this provision has concluded that "[t]he labeling acts manifest neither a congressional intention to preempt courts from granting money judgments nor a conflict between such judicially imposed liability and federal law." Garner, *supra*, 53 S. Cal. L. Rev. at 1454.

14. Defendants are correct that, in addressing this question, the court focuses not upon the purposes of state law, be they regulatory or merely compensatory, but upon the effect of such law. *See, e.g., Perez v. Campbell*, 402 U.S. 637, 650-652, 91 S.Ct. 1704, 1711-12, 29 L.Ed.2d 233 (1971). Thus, the court here examines "first the purposes of the federal law and second the *effect* of the operation of the state law on these purposes." *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (emphasis supplied), citing *Perez, supra*. In this sense, the analysis here undertaken differs from that regarding express preemption, *supra*, at 1153-1156. There, the question was one of whether the New Jersey common law of products liability constituted regulation; the New Jersey courts' characterization of such law is much more relevant to that inquiry.

This question requires that the court first examine the purposes of the Act. As we have seen, as they relate to its preemptive provision, those purposes are essentially two: first, Congress intended to ensure the continued vitality of the tobacco industry, for economic reasons and to preserve freedom of choice for the individual; second, Congress sought to implement this and other goals by making uniform the labeling and advertising requirements imposed upon cigarette manufacturers. Defendants also point to the obvious remedial purposes of the Act, which sought to address the health concerns raised by the Surgeon General's Report, and argue that these purposes are best furthered by a concise and unambiguous warning. It is claimed that all of these purposes will be undermined by the simultaneous existence of state common law claims such as those asserted by plaintiff.

The court first notes that in no event is compliance with both the Act and state law a "physical impossibility." At most, state law imposes liability in the form of damages upon defendants. Payment of such damages, as well as fulfillment of the labeling requirements of the Act, are clearly possible. Indeed, the imposition of criminal liability under the Act, as well as the payment of damages, are both possible. *See, Silkwood, supra*, 104 S.Ct. at 626. Defendants, however, argue that state common law may impose, for example, labeling requirements inconsistent with the Act, rendering compliance with both impossible. This argument is without merit. First, as observed earlier, common law liability does not impose requirements upon any party; rather, it allows parties to choose between risking further liability by not changing their behavior, or attempting to negate such risk by, for example, adding a more stringent label to a cigarette package. Which course of action one takes is a matter of choice; one cannot be enjoined or held criminally liable for the course taken. Hence, no requirement is imposed. As the Court of Appeals for the District

of Columbia has recently stated, in holding that a label found adequate by the Environmental Protection Agency for purposes of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, ("FIFRA") could nonetheless provide the basis for liability under Maryland common law, notwithstanding a preemption clause prohibiting states from imposing different labeling requirements.

> . . .Maryland can be conceived of as having decided that, if it must abide by EPA's determination that a label is adequate, Maryland will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented had Maryland been allowed to require a more detailed label or had Chevron persuaded EPA that a more comprehensive label was needed. The verdict [against Chevron] does not command Chevron to alter its label—the verdict merely tells Chevron that if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label. Chevron can comply with both federal and state law by continuing to use the EPA-approved label and by simultaneously paying damages to successful tort plaintiffs such as Mr. Ferebee.

Ferebee v. Chevron Chemical Co., supra, 736 F.2d at 1541.[15]

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15. Defendant Loew's Theatres, Inc. has attempted to distingish *Ferebee* (Cont'd)

Moreover, even if a verdict against cigarette manufacturers were viewed as imposing a requirement upon them, and the manufacturers thus chose to place an additional warning on, or in their packages, such action would not be incompatible with the Act. Section 1333 makes it unlawful not to place the prescribed warning on cigarette packages; it is silent as to additional information or warnings that might also be included.[16] Hence, it is not "physically impossible" for a cigarette manufacturer to chose to alter its behavior in response to an adverse jury verdict.

Nor does the existence of state common law claims stand as an obstacle to the execution of Congress' intent in passing, and then amending, the Act. Primarily, this is because, as in *Silkwood,* Congress intended that state common law claims survive, and thus, that whatever tension exists between federal regulation of cigarette labeling and advertising and state common law claims be tolerated. 104 S.Ct. at 625. That congressional

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(Cont'd)
from the instant matter, based primarily upon the regulatory scheme created by FIFRA. It is true that FIFRA, unlike the Federal Cigarette Labeling Act, delegates great responsibility to the states. From this fact, defendant gleans a legislative intent not to preempt state common law claims. While the existence of a state role may be evidence of an intent not to preempt, it is neither the only such evidence, nor necessary to a holding that preemption has not occurred. Just as the court did in *Ferebee*, and in *Silkwood*, this court has examined the legislative history of the Act at issue in great detail. Its conclusion—that preemption is not warranted—is based, as it should be, on that particular history. *See Note, supra,* 12 Stanf. L. Rev. at 208-210. Other cases, such as *Ferebee* and *Silkwood*, state general principles applicable here, but the court recognizes that the results reached in each of those cases are instructive only by analogy.

16. Because the Act carries criminal penalties, it should be strictly construed. *See, e.g., United States v. Bass,* 404 U.S. 336, 348, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971).

intent is, as has been shown, clear: state common law claims existed prior to passage of the Act, were assumed to have a continued existence during the legislative process, and were not eliminated by the passage of the Act. Though it is true that, as defendants argue, even state regulation supplementary to a federal enactment—a characterization not inapposite here—may be preempted by such federal enactment, *see, e.g., Campbell v. Hussey,* 368 U.S. 297, 302, 82 S.Ct. 327, 329, 7 L.Ed.2d 299 (1961); *Cosmetic, Toiletry & Fragrance Association, Inc., v. State of Minnesota,* 440 F.Supp. 1216, 1224 (D.Minn. 1977), *aff'd,* 575 F.2d 1256 (8th Cir. 1978), that is only the case where there is an actual conflict between the two, and the federal enactment is "significantly impeded by the state law." Tribe, *supra,* § 6-24 at 379 and n. 12. No such conflict exists here.

First, Congress' intention that the cigarette industry be allowed to survive, and that the consumer remain free to choose or not to choose to smoke, is not undermined by the imposition of liability upon cigarette companies.[17] That concern was reflected in Congress' decision not to ban cigarettes or cigarette advertising altogether, and to maintain uniform labeling. Congress recognized that liability under state tort law would continue to exist, and did nothing to immunize cigarette manufacturers from such liability. The argument that the imposition of such liability will jeopardize the entire cigarette industry, and with it the nation's economic well-being and its citizens' freedom of choice, is hypothetical and speculative at best. Indeed, even those claims based upon theories of strict products liability, may co-exist with an industry whose development and promotion are to be fostered by congressional action. *See Silkwood, supra,* 104 S.Ct. at 625-26.

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17. The court notes that this is particularly true in light of the failure of prior cases of this sort. *See supra* at 1161-1162 (citing cases).

A fortiori, they exist where, as here, the industry upon which liability is to fall is one which Congress has found responsible for death and disease. In any event, as with nuclear power, the legislative history of the Federal Cigarette Labeling Act reveals a Congress unwilling to deprive individuals of their common law damage remedies, whatever they may be.[18]

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18. Defendants argue that plaintiff's risk-utility claims in particular are preempted in that, since such claims would enable juries to drive the cigarette industry out of business, they conflict with the congressional purpose to ensure the survival of the cigarette industry. *See O'Brien v. Muskin Corp., supra,* 94 N.J. at 184, 463 A.2d 298. This argument misconceives the nature of this claim: risk-utility is one method of taking the first step in deciding whether a strict liability analysis should be applied, by proving the existence of a defect. *O'Brien, supra,* 94 N.J. at 185-86, 463 A.2d 298. *See also Feldman v. Lederle Laboratories, supra,* 97 N.J. at 444 and n. 4, 479 A.2d 374. That method renders a manufacturer strictly liable for injuries suffered as a result of its product, irrespective of whether such manufacturer knew or should have known of the product "defect." *See Feldman, supra,* at 450-51, 479 A.2d 374. However, the method also requires the assessment of many factors—the so-called "Wade factors"—including the reasonableness of the defendant's conduct in failing to improve the product (factor 4) and of the plaintiff's conduct in using it (factors 5 and 6). In particular, risk-utility analysis requires that the jury assess

> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.

O'Brien, supra, 94 N.J. at 182, 463 A.2d 298, quoting *Cepeda v. Cumberland Engineering Co.,* 76 N.J. 152, 174, 386 A.2d 816 (1978). Hence, reflected in risk-utility analysis is a set of principles traditionally associated with torts based upon negligence. *O'Brien, supra,* 94 N.J. at 181, 463 A.2d 298. More important, age-old notions of assumption of risk, such as those about which Congress was concerned in debate, *see supra,* at 1162-1163, are contemplated in factor 6, quoted above. The argument then, that this type of analysis was outside the

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Second, as shown above, Congress manifested a deep concern over the possibility that different states or localities would impose different labeling or advertising requirements, thereby both imperiling the tobacco, advertising and related industries, and undermining the "comprehensive federal program" which it sought to implement. Of course, such uniformity would not necessarily be imperiled by a jury verdict against cigarette manufacturers, for such verdict might not result in a corresponding change in behavior on the part of the manufacturers; the choice would be theirs to make. Thus, in other areas in which federal labeling is mandated, or directed by federal agencies, as advertising is under the Act, 15 U.S.C. § 1335-36, state common law liability has nonetheless been allowed to survive. *See, e.g., Ferebee, supra,* 736 F.2d at 1540-52; *Feldman, supra,* 97 N.J. at 461, 479 A.2d 374, citing, *e.g., Brochu v. Ortho Pharmaceutical Corp.,* 642 F.2d 652, 658 (1st Cir. 1981) (drug manufacturer liable under state tort law for failure to warn notwithstanding FDA approval of "uniform" label);[19] *Raymond v. Riegel Textile Corp.,* 484 F.2d

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scope of congressional contemplation, is without merit. Congress abridged no common law cause of action whatsoever in passing the Act. That each such cause of action, and this one in particular, may prove injurious to the cigarette industry is a truism, but one that apparently did not bother Congress.

19. FDA approved warnings thus do not preempt state common law products liability claims *despite* the preemptive effect that has generally been given the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq. See generally McDermott v. State of Wisconsin,* 228 U.S. 115, 131-32, 33 S.Ct. 431, 434-35, 57 L.Ed. 754 (1913); *National Women's Health Network v. A.H. Robins Co.,* 545 F. Supp. 1177, 1181 (D. Mass. 1982); *Pharmaceutical Society of the State of New York, Inc. v Lefkowitz,* 454 F. Supp. 1175, 1179 (S.D.N.Y. 1978) (state labeling laws preempted to the extent they conflict with the Act) (dictum), *aff'd,* 586 F.2d 953 (2d Cir. 1978); *Cosmetic, Toiletry & Fragrance Association, Inc. v. State of Minnesota, supra,* 440 F. Supp. at 1220-25.

1025, 1026-28 (1st Cir. 1973) (state products liability law applied notwithstanding standards promulgated in the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.*, which, at that time, contained a broad preemption provision) (citing cases); *Hubbard-Hall Chemical Co. v. Silverman,* 340 F.2d 402, 405 (1st Cir. 1965) (Department of Agriculture approved label did not preempt state tort action for failure to warn, in part because Congress had not occupied the field in this area). Underlying these decisions, is the recognition that compensation for individuals as a result of an injury caused by particular products is not only a right that ought to be abridged only where Congress clearly intended to do so, *see Silkwood, supra,* 104 S.Ct. at 623; *id.* at 629 (Blackmun, J., dissenting); *Raymond v. Riegel Textile Corp., supra,* 484 F.2d at 1028, but also one that does not necessarily interfere with governmental regulation of such products. *See Silkwood, supra,* 104 S.Ct. at 626. Here, too, the notion that unless state common law claims are preempted, cigarette manufacturers will be subjected to multiple and conflicting standards with regard to labeling and advertising, is purely hypothetical. Plaintiffs may not prevail in these lawsuits and, if they do, manufacturers may not respond to such suits by altering their labels or changing their advertising practices. *See Ferebee, supra,* 736 F.2d at 1541. Viewed this way, the payment of compensation to victims of tortious activity on the part of defendants, if it is proved, does not necessarily, or even probably, conflict with the purposes of uniformity that underlie the Act, let alone jeopardize the survival of the tobacco industry.

Indeed, the payment of such compensation may further the remedial purposes of the Act, by, for example, aiding in the exposure of dangers not previously associated with cigarette smoking, encouraging manufacturers or consumers to petition Congress, the FCC or the FTC for reasonable regulatory changes,

or itself pressuring Congress to act. *See Ferebee, supra,* 736 F.2d at 1541-42. Moreover, defendant's argument that, were the Act to result in added warnings, it would dilute the effectiveness of the warnings that now exist, thereby undermining the primary purpose of the Act, is without merit. Congressional concern was focused on a fear that such warnings would become encumbered with qualifications, and the message that cigarette smoking is dangerous be accordingly weakened. *See* S.Rep. No. 195, *supra,* at 4. Congress feared not stronger, but weaker statements; only the former would be encouraged by state tort recoveries.[20] Hence, even industry reaction to a finding of liability would not, in this sense, engender conflict with the Act.

In sum, the payment of compensation to injured individuals in no way creates an actual conflict with the Federal Cigarette Labeling Act, or Congress' goals in enacting it. As Congress has not occupied a field which encompasses common law causes of action, or explicitly stated that it intended to preempt such claims, the court cannot but find that such claims exist now, as they existed prior to passage of the Act. The legislative history of the Act, and its amendment, further confirms that Congress did not intend that such claims be preempted. These claims survive and continue

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20. The court notes in this regard that the House of Representatives has recently passed a measure that would mandate stronger warnings on cigarette packages; these four warnings would be placed on such packages on a rotating basis. In addition to complicating the entire warning scheme, three of these four warnings are longer than the body of the present labeling requirement. *See* 130 Cong. Rec. H9222 (Sept. 10, 1984) (text of H3979, § 4(a)(1)). The court recognizes that this bill represents legislation which remains pending and is therefore of limited value in assessing even Congress' present inclination, let alone that of the Congress which passed the Act here under consideration. Still, the Bill demonstrates a diminished congressional concern with a simple or concise labeling scheme where such scheme does not accurately represent the dangers associated with smoking.

to represent an individual's sole recourse in the event of injury based on cigarette smoking, should that injury be found to have resulted from manufacturers' tortious activity, whether that be in the manufacture, design, advertising or marketing of their undisputably harmful products. Congress did not, despite its solicitousness for the cigarette industry, deprive citizens of this recourse. Nor shall the court, in deference to Congress and with respect for the state common law and individuals' right to invoke it, do so.

CONCLUSION

The arguments presented by the defendants in this case symbolize a common misperception of the function of government regulation and the imposition of standards of conduct which result. It would be inappropriate to conclude that what is not prohibited is permitted or that a minimum standard fixes the maximum as well. It is impossible for the government to codify every act which should not be done or the standards by which every act should be performed. Thus, government has frequently established standards in those areas in which a particular industry has failed to establish its own. But injuries to persons, property and the environment were wrong even before government declared that they were wrong.

Now that government has acted in many areas and decreed safety and quality standards, it would be unfortunate if those directed to do no less, assume that they need do no more. In almost every instance, government standards are meant to fix a level of performance below which one should not fall. However, legal minimums were never intended to supplant moral maximums. Nor were they intended to eliminate pride in quality and craftsmanship or self-imposed standards of health and safety.

Appendix D

In this case the tobacco industry argues that because the warning mandated by Congress prohibits them from doing less, they need not and cannot do more. The court here concludes that the warning of the Surgeon General fixes the minimum. Indeed, indications are that the Surgeon General himself does not view the warning as adequate. For these reasons, persons who claim that the warnings are not adequate and that they have been injured as a result should not be deprived of the opportunity of so proving. By this decision the court does not find that they will succeed, but only that they have the right to present their claims for adjudication.

Defendant's motion for judgment on the pleadings is denied. Plaintiff's motion to strike defendants' preemption defenses is granted. An appropriate order will issue.

APPENDIX E — EXTENSION OF TIME TO FILE DATED NOVEMBER 21, 1990

SUPREME COURT OF THE UNITED STATES

No. A-389

Antonio Cipollone, Individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

v.

Liggett Group, Inc. et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 28, 1990.

/s/ David H. Souter
Associate Justice of the Supreme
Court of the United States

Dated this 21 day of November, 1990.

APPENDIX F — RELATED CASE IN CONFLICT WITH *CIPOLLONE: FORSTER, ET AL. V. R.J. REYNOLDS TOBACCO CO., ET AL.*

John Forster, et al., Respondents, v. R.J. Reynolds Tobacco Company, Petitioner, Appellant, Erickson Petroleum Corporation, d.b.a. Holiday Station Stores, Inc., petitioner, Appellant

No. C1-87-2170

Supreme Court of Minnesota, En Banc

April 14, 1989, Filed

PRIOR HISTORY: Review of Court of Appeals.

SYLLABUS:

Under the Federal Cigarette Labeling and Advertising Act, state tort claims based on a state-imposed duty to warn are impliedly preempted; other state tort claims are not preempted.

Affirmed in part, reveresed in part, and remanded for further proceedings.

COUNSEL: James S. Simonson, Minneapolis, MN, John L. Strauch, William T. Plesac, Cleveland, OH for R.J. Reynolds Tobacco Company; Mark A. Gwin, Minneapolis, MN for Erickson Petroleum Corporation

Michael L. Weiner, Minneapolis, MN for John Forster, Et al.

Amicus Curiae: Alan B. Morrison, Washington, DC for Amer. Cancer Society, Amer. Heart Assoc., Amer. Lung Assoc.,

Amer. Public Health Assoc., and Public Citizen; Michael V. Ciresi, Roberta P.B. Walburn, Mpls, MN for MN Trial Lawyers Assoc; Hubert H. Humphrey, III, Attorney General, Peter M. Ackerberg, Special Assistant Attorney General, St. Paul, MN for State

JUDGES: SIMONETT, Justice, Heard, considered, and decided by the court en banc.

OPINION BY: SIMONETT

SIMONETT, Justice

The trial court ruled that plaintiff's suit claiming cancer from cigarette smoking was barred by federal preemption. The court of appeals reversed. We affirm in part and reverse in part.

Plaintiff John Forster has sued defendant R.J. Reynolds Tobacco Company and Erickson Petroleum Corporation, d.b.a. Holiday Station Stores, Inc., claiming he contracted terminal cancer from smoking Camel cigarettes for 30 years. Mr. Forster alleges he began smoking in 1953 at age 15; that he was persuaded by Reynolds' advertising that cigarette smoking was glamorous and nonhazardous to health; and that by the time he was convinced smoking was unhealthy, he was addicted, and notwithstanding many attempts to overcome the addiction, he was unable to do so. (Since suit was commenced, Mr. Forster has died and the action is to be converted into one for wrongful deaths).

Plaintiff's complaint alleges counts of strict products liability, breach of warranty, and negligence, plus derivative claims for Mrs. Forster's loss of consortium and punitive damages. Defendants moved for summary judgment on the grounds that the Federal Cigarette Labeling and Advertising Act (the Act)

preempts any state tort claims, and on the further grounds that the complaint fails to state a cause of action under state law for strict products liability. Pretrial discovery was postponed pending disposition of the motion. The trial court granted summary judgment on preemption grounds and did not rule on the other grounds. On appeal, the court of appeals reversed, holding there was no federal preemption. Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691, 696 (Minn. App. 1988). We granted defendants' petition for further review.

Part I of this opinion considers the preemptive implications of the Act. In Part II we apply the conclusions reached in Part I to the various causes of action alleged in plaintiff's complaint.

I.

In 1965 Congress enacted the Federal Cigarette Labeling and Advertising Act. 15 U.S.C. § 1331-1339 (Supp. V 1965-69). Section 1333 of the Act stated it was unlawful to manufacture or sell cigarettes which did not have conspicuously on the package the warning label: "Caution: Cigarette Smoking May be Hazardous to Your Health." In 1970 Congress amended the Act to change the label to: "Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health."[1] In 1984, the message on the warning label was again

1. 15 U.S.C. § 1333 (1970). The 1970 amendment also gave the Federal Trade Commission authority to require the same warning label in cigarette advertising after July 1, 1971. *See* 15 U.S.C. § 1336 (1982). In addition, all cigarette advertising on television and radio was banned after January 1, 1971. *See* 15 U.S.C. § 1335 (1982).

escalated.[2] Defendant Reynolds has complied with the Act's warning requirements. It claims the Congress, in fashioning this elaborate warning scheme, has preempted the field of cigarette regulation so that cigarette manufacturers are immune from state tort claims for injuries to health from using their product. 15 U.S.C. § 1333(a)(1) (Supp. 1984).

We need, therefore, to examine the federal legislation to determine if Congress, either expressly or impliedly, intended to preempt state tort claims. The section of the 1965 Act, entitled "preemption," stated:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health,

2. Cigarette manufacturers were required to rotate four different warning labels on their packages of cigarettes. The four warnings were:

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
>
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

> shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.
>
> (c) Except as is otherwise provided in subsections (a) and (b) of this section, nothing in this chapter shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes . . .

15 U.S.C. § 1334 (1965) (amended 1984). In 1970, subparagraph (b) was amended to read:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b) (1970) (emphasis added).

Contrary to defendants' contention, we do not think any of the above quoted language expressly preempts a state common law tort action. The phrase "requirement or prohibition . . . imposed under State law" is too obscure for us to say that it is an express declaration that state common law tort actions are preempted. Express preemption requires Congress to speak plainer.

The issue before us, then, is whether federal preemption is to be implied. Under our system of federalism, it is assumed that Congress in legislating does not intend to hobble the states in their regulation of matters of state concern. *See Maryland v.*

Louisiana, 451 U.S. 725, 746 (1981). This state has a vital interest in protecting the health and safety of its citizens. *See, e.g., Pikop v. Burlington N.R.R. Co.*, 390 N.W.2d 743, 753 (Minn. 1986), *cert. denied*, 480 U.S. 951 (1987). Our state constitution affirms the importance of our citizens having legal redress when harmed. Minn. Const. art. I, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs . . . . ").

Consequently, if federal preemption is to be implied, congressional intent to do so must be clearly inferred, either from the extent of federal involvement or from the scope of the federal interest; and even then the state will be preempted only to the extent that state regulation "actually conflicts" with federal law. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). A conflict arises if compliance with both state and federal law is a physical impossibility (not the case here), or if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* We must determine, then, if allowance of state common law tort actions would frustrate the objectives of the federal Act.

Congress has clearly stated the federal interest in cigarettes and health. The declaration of policy in the Act proclaims the purpose of the legislation is "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." The Act goes on to say that the federal program is established so that

> 1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

> 2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (Supp. V 1965-69) (amended 1984).

First of all, it seems to us that Congress has decided that even though cigarette smoking is addictive and hazardous to health, cigarettes may be lawfully marketed if labeled as congress dictates. This policy represents a balance or compromise between the national interest in protecting health by not smoking and the national interest in protecting commerce and the country's tobacco economy. Congress has struck this balance by warning people they should not smoke if they value their health but leaving the decision whether to smoke up to them. In order that "the public may be adequately informed" of the health hazards of smoking, Congress has provided a warning "to that effect." Further, Congress has reserved to itself what this warning will say and where it must be placed. In other words, Congress has declared its warning is an adequate warning and only its warning need be given. Finally, Congress has said it does not want diverse, nonuniform, and confusing cigarette labeling and advertising regulations.

Reynolds argues that this "comprehensive Federal program" preempts any state tort claim based on a duty to warn; further, it bars any state tort based on false or misleading representations or false advertising; and, further, it preempts any state tort claim based on strict products liability for defective manufacture, design, or failure to warn. Reynolds relies on the leading case of *Cipollone*

v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 464 U.S. 1043 (1987), which holds that the federal Act preempts those state tort claims "that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." *Id.* at 187 (citation omitted). Courts from other jurisdictions have followed *Cipollone*[3].

Because the cigarette manufacturer has complied with the federal duty to warn, a state tort claim for failure to warn must be based on a duty to give a warning different than the warning under federal law. If state claims are allowable, the jury on each state claim reevaluates the federal duty in terms of a state standard of adequacy and assesses tort damages against a manufacturer found to be wanting. This, we think; constitutes a state-imposed regulatory scheme superimposed on the federal scheme. *Cf. San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (compensatory damages can be a potent method of governing conduct and controlling policy" and cannot be used "to regulate activities that are potentially subject to the exclusive federal regulatory scheme"). Here, the state tort claim regulatory scheme would directly conflict with one of the announced purposes of the Act, namely, to avoid "diverse, nonuniform, and confusing" regulations relating to cigarette smoking and health, and would effectively dismantle the federal plan. *See Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1967). Congressional intent to obviate this dismantlement is further evident in section

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3. Three other federals courts of appeal have followed Cipollone, namely, *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); and *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987). Also in accord is *Dewey v. Brown & Williamson Tobacco Corp.*, 542 A.2d 919, 225 N.J. Super. 375 (1988).

1334(b) which says no requirement or prohibition relating to smoking and health shall be imposed under state law with respect to the advertising or promotion of cigarettes.

As we understand plaintiffs and amici,[4] they do not claim that state tort claims based on inadequate warning would not conflict with the federal Act; rather, they argue this conflict is acceptable to Congress, and, in any event, the conflict is incidental in its impact. We disagree.

Plaintiffs site *Silkwood,* where the United States Supreme Court permitted a state punitive damages claim to be brought even though it conflicted with the federal safety regulatory scheme for nuclear facilities under the Atomic Energy Act. The Court said this "consequence was something that Congress was quite willing to accept." *Silkwood,* 464 U.S. at 256. In making this statement, however the Court had in mind an amendment to the law (the Price-Anderson Act), where congress obviously assumed that persons injured in nuclear accidents were free to pursue state tort remedies, at least those of a compensatory nature. *Id.* at 251-52. *See also, Gryc v. Dayton-Hudson Co.,* 297 N.W.2d 727 (Minn.), *cert. denied,* 449 U.S. 921 (1980) (where this court observed that the Flammable Fabrics Act had been amended to expressly confirm that a pajama manufacturer's compliance with federal consumer safety rules did not relieve the manufacturer of liability at common law or under state statute). Reynolds, on the other hand, cites International *Paper Co. v. Ouellette,* 479 U.S. 481 (1987), where the Court held that a state action for

4. We have recieved amicus briefs from the State of Minnesota, American Cancer Society, American Heart Association, American Lung Association, American Health Association, Public Citizen, and Minnesota Trial Lawyer's Association.

Lake Champlain was impliedly preempted by the Clean Water Act. Our reading of these cases and others persuades us that each case turns on the particular legislative history involved.

We find nothing in the legislative history of the Labeling Act and its amendments which tells us Congress thought that state tort claims could be maintained when in actual conflict with the federal law. This, too, has been the conclusion of the other courts which have looked at the legislative history. *See, e.g., Palmer,* 825 F.2d at 623 (legislative history of the Act contains "contradictory, even self-serving language"). The best indication of congressional intent, we think, is what congress said in the statute. Congress said it wanted to avoid diverse, nonuniform, and confusing regulations. This statement of intent is at odds with plaintiffs' claim that Congress contemplated a diversity of conflicting state regulations coexisting with the federal regulatory scheme, or that congress intended its warning to be a minimal warning to which a state could add further requirements.[5]

5. Plaintiffs' and amici's reliance on *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529 (D.C. Cir.), *cert. denied,* 469 U.S. 1062 (1984), is misplaced. The D.C. Circuit held that a state tort action for inadequate warning on a pesticide container with a warning label approved by the Environmental Protection Agency was not preempted by the federal law. Although the case has language favorable to our plaintiffs here, the case is distinguishable on several grounds. For example, the pesticide statute said, "A State may regulate the sale or use of any federally registered pesitcide . . . " *Id.* at 1421. There was no declaration in the pesticide statute, as in the Cigarette Labeling Act, that its purpose was to avoid diverse or nonuniform regulation. Indeed, under the pesticide statute, it was incumbent on the manufacturer to obtain federal approval of its warning label and, if the label were later found to be deficient—such as in state tort claim—the manufacturer could petition the EPA to revise the label. *Id.*

We hold, therefore, that state tort claims based on a state-imposed duty to warn are impliedly preempted. In this connection, it should be noted that the Act does not preclude cigarette manufacturers from advertising and promoting their product. When they do so, they are not required to expand on the federal warning label; the Act says that label suffices. The Third Circuit in *Cipollone* says "the propriety of a party's actions with respect to the advertising and promotion of cigarettes" is also preempted. *Cipollone*, 789 F.2d at 187. We are unclear what this means. Presumably the Third Circuit had in mind the interplay of section 1334(b); namely, that with respect to advertising and promotion, insofar as it relates to smoking and health, "[n]o requirement or prohibition shall be imposed under State law . . . ." As we read the Act, the bedrock on which implied preemption rests is the avoidance of a conflict between a state claim and the federal warning label. Consequently, any state claim that questions the adequacy of cigarette advertising or promotion with respect to smoking and health, or which questions the effect of that advertising or promotion on the federal label, is preempted.[6]

This brings us to Reynolds' next argument that state tort claims based on the "defective condition" of the product are also preempted. This argument assumes the real thrust of plaintiffs' lawsuit is that cigarettes are by nature "defective" and should not be sold, that plaintiffs' claims are really an attempt to outlaw cigarettes by means of state tort actions. To allow state tort actions to be used in this manner, argues Reynolds, would destroy the balance struck by Congress to permit cigarettes to be lawfully

6. An affirmative misrepresentation with respect to smoking and health which occurs in advertising or promotion would not necessarily implicate the federal label and, therefore, would not be preempted. *See* discussion in Part II, *infra*.

sold if they carry the federal warning label; therefore, all state tort claims must be preempted. This argument, we think, claims too much for state common law tort actions. Those who urge plaintiffs to sue may hope that as a byproduct of state tort litigation, cigarette manufacturers will go out of business, but the tort actions themselves are not based on any claim that the sale and use of cigarettes is prohibited by law. The state claims are to be resolved under common law principles of liability. Therefore, aside from the duty to warn, there is no federal preemption for claims based on a "defective condition" of the product.

II.

We need now to discuss preemption with specific reference to each cause of action alleged in plaintiffs' complaint.[7]

Our case comes to us on a grant of summary judgment by the trial court; however, no factual record has been developed and we have basically only the claims as alleged, often quite vaguely, in the complaint. While we consider these claims in light of our ruling on the preemptive effect of the Act, we realize there are gray areas left for the trial court on remand, areas that can only be resolved after plaintiffs have better shaped their causes of action, both in their pleadings and on the facts.

7. In *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), the issue of preemption arose on plaintiff's motion to strike the defendant's affirmative defense of federal preemption. In denying the motion to strike, the appellate court was not required to apply its general holding to tile specific tort claims alleged, leaving that job to the trial court. For the aftermath, *see Cipollone v. Liggett Group, Inc.*, 649 F.Supp. 664 (D. N.J. 1986) and *Cipollone v. Liggett Group, Inc.*, 683 F.Supp. 1487 (D. N.J. 1988).

Appendix F

Strict Liability

Plaintiffs' first count alleges defendants, in selling and advertising cigarettes, failed to warn adequately of the adverse health consequences; that they promoted and advertised their product so as to "neutralize" any warning; that their product presented a risk of harm greater than any social utility; that the product was represented as safe for use; that the product was in a defective condition unreasonably dangerous for use; and, hence, defendants "are strictly liable in tort." This rather expansive notion of strict liability is best considered by breaking it down into its components.

First of all, a claim is made in strict liability for failure to warn. Our recent cases have tended to consider failure to warn in product cases as more akin to negligence. *See, e.g., Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984). In any event, for reasons already given, we hold that plaintiffs' cause of action for failure to warn is preempted.

Count One next claims strict liability for a product defective under a risk-utility analysis. In this state we use a risk-utility balancing test to determine if a product liability claim will lie for a design effect. *See Bilotta,* 346 N.W.2d 616. Reynolds argues that this theory of recovery is preempted because Congress has already made its own risk-utility decision and has allowed cigarettes to be used. This congressional policy decision is not, however, what products liability has in mind. Strict liability assumes the product is useable and asks only if it has been safely designed. So understood, we see no conflict between the state tort action and the Act. We hold that plaintiffs' claim in strict liability for unsafe design is not preempted. The complaint also alleges that defendant's product was in a defective condition unreasonably

Appendix F

dangerous for use. It is unclear what plaintiffs have in mind here, but if plaintiffs can prove a defective condition or a defective design--apart from any claim of inadequacy of warning—we see no conflict with the federal Act.[8]

Finally, Count One alleges that the product was represented as safe for use and was advertised as safe and nonhazardous. This allegation does not really sound in strict liability; although sparsely pleaded, it appears plaintiffs are asserting a cause of action for intentional misrepresentation. The claim, it should be noted, is not for fraudulent concealment of information which would really be a variation of the duty to warn and hence preempted. It is based, rather, on affirmative statements made which are allegedly untrue. Such a claim would not be preempted. If the cigarette manufacturer chooses to provide further information on smoking as it relates to health, these statements, if they meet the requirements for a common law misrepresentation action, would be actionable. *See Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 149 N.W.2d 37 (1967). The action is based on a duty to tell the truth, not on a duty to warn. Misrepresentation is concerned with the truthfulness of what one says; the duty to warn assumes truthfulness and is concerned with how much of what is truthful must be disseminated. Concededly, a false representation (*e.g.*,

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8. The claims of unsafe design and defective condition remain exposed to defendants' asserted defense, yet to be ruled on, that they fail to state a claim for relief under state law. Defendants, for example, point to the discussion of a defective condition for food and drink products in *Restatement (Second) of Torts* § 402A (1965). The Restatement takes the position that products like tobacco and whiskey, though addictive and harmful to health, are not "defective," unless foreign substances are added. *Id.* comment i. In any event, the parties have not yet set out their positions on unsafe design and defective condition beyond the pleading stage. All that is before us now and all that we decide is that federal preemption does not apply to these claims.

"smoking will not cause emphysema") conflicts with the federal warning label. But the cause of action, in a preemption sense, does not lie in challenging the adequacy of the federal warning nor in claiming a dilution of that warning, but only in asserting the falsity of what the cigarette manufacturer has chosen to say. To the extent there is a "conflict," it is indirect and self-imposed by the cigarette manufacturer. To find in this situation an implied preemption, we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health.

Indeed, it is clear Congress did not intend cigarette advertisers to be free to engage in deceitful advertising practices because it expressly provided in the Act for the Federal Trade Commission to act in such instances. Section 5(b) of the 1965 Act. *Cf. Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). Nor do we think that a state tort action for misrepresentation conflicts with FTC regulation; the two remedies can exist comfortably together. So long as plaintiff does not claim the advertising was deceptive because it did not adequately warn, the claim for misrepresentation is not preempted. Interestingly, in the Cipollone trial following remand, a claim for intentional misrepresentation was submitted to the jury. Cipollone v. *Liggett Group, Inc.*, 683 F.Supp. 1487, 1499-1500 (D. N.J. 1988).

Breach of Warranty

The second count simply repeats the allegations of the first count and says they constitute breaches of express and implied warranty. The warranty claims are similar to strict liability; hence, our foregoing analysis governs. To the extent a breach of warranty is based on a duty to warn it is preempted; otherwise it remains

viable, subject, of course, to any applicable state law defenses.

By way of illustration, compare a 1961 pre-Act case, *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961). There the defendant's ad said, "A good cigarette can cause no ills . . . " and "Nose, throat and accessory organs not adversely affected by smoking Chesterfields." The Third Circuit in *Pritchard* held that a cause of action would lie for breach of express warranty. *Id.* at 296. As indicated in our discussion above on misrepresentation, a similar warranty claim today would not be preempted by the Act.

Negligence

The third count alleges "defendants were negligent in the manufacture, sale, and advertising" of Camel cigarettes. The pleading does not explain what is meant by a negligent sale, nor by negligent advertising. In any event, the same rulings as above apply. To the extent negligence is claimed to be breach of a duty to warn about the hazards of smoking, it is preempted.

Other Counts

Plaintiffs' fourth count for Mrs. Forster's loss of consortium is a derivative action and needs no independent discussion. The fifth count is for punitive damages. A claim for punitive damages in this state is not an independent tort. *See Jacobs v. Farmland Mutual Ins. Co.*, 377 N.W.2d 441, 445 (Minn. 1985). If the issue of punitive damages is reached, failure to warn cannot be used as a factor bearing on punitive damages.

Finally, the complaint does not allege separate causes of action accruing prior to the enactment of the 1965 Labeling Act. The

complaint does allege, however, that Mr. Forster began smoking in 1953, and apparently he claims he became addicted to cigarettes prior to the enactment of the 1965 Labeling Act. The Act does not specifically provide for retroactive preemptive effect. Consequently, we hold that the federal Act does not preempt a pre-1966 claim based on failure to warn. *See Kotler v. American Tobacco Co.*, 665 F.Supp. 15 (D. Mass. 1988). Reynolds does not disagree that pre-1966 claims are viable but argues that they suffer from fatal problems of causation and must fail as a matter of state law. Issues of state law defenses are not, however, before us.

Affirmed in part, reversed in part, and remanded for further proceedings.

APPENDIX G — RELATED CASE IN CONFLICT WITH *CIPOLLONE; DEWEY ET AL. v. R.J. REYNOLDS TOBACCO CO., ET AL.*

577 A.2d 1239

CLAIRE E. DEWEY, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF WILFRED E. DEWEY, DECEASED, PLAINTIFF-RESPONDENT AND CROSS-APPELLANT, v. R.J. REYNOLDS TOBACCO CO., DEFENDANT-INTERVENOR, AND R.J. REYNOLDS INDUSTRIES, INC., AMERICAN BRANDS, INC., (FORMERLY THE AMERICAN TOBACCO COMPANY, INC.), DEFENDANTS, AND BROWN & WILLIAMSON TOBACCO CORPORATION, DEFENDANT-APPELLANT AND CROSS-RESPONDENT.

Argued January 18, 1989—Decided July 26, 1990

Martin London, argued the cause for appellant and cross-respondent (*Norris, McLaughlin & Marcus*, attorneys; *William C. Slattery*, on the briefs).

Peter N. Perretti, Jr., argued the cause for defendant-intervenor (*Riker, Danzig, Scherer, Hyland & Perretti*, attorneys; *Peter N. Perretti, Jr.* and *Alan E. Kraus*, on the brief).

Marc Z. Edell argued the cause for respondent and cross-appellant (*Budd, Larner, Gross, Picillo, Rosenbaum, Greenberg & Sade* and *Wilentz, Goldman & Spitzer*, attorneys; *Marc Z. Edell* and *Alan Darnell*, of counsel; *Marc Z. Edell, Alan Darnell*, and *Cynthia A. Walters*, on the briefs).

Adam S. Henschel submitted a brief on behalf of *amicus curiae*, Association of Trial Lawyers of America, New Jersey Chapter (*Greenberg & Prior*, attorneys; *William S. Greenberg*,

of counsel; *William S. Greenberg* and *Adam S. Henschel,* on the brief).

The opinion of the Court was delivered by

CLIFFORD, J.

This products-liability case poses two troubling questions: (1) whether the Federal Cigarette Labeling and Advertising Act, 15 *U.S.C.* §§ 1331-40 (1982 & Supp. III 1985) (hereinafter Cigarette Act), preempts plaintiff's claims, and (2) whether the recently-enacted New Jersey Products Liability Law, *N.J.S.A.* 2A:58C-1 to 7 (hereinafter Products Liability Law) is applicable retroactively and renders a surviving claim invalid as a matter of law. The Law Division entered an order of partial summary judgment in favor of defendant Brown & Williamson Tobacco Co. *Dewey v. R.J. Reynolds Tobacco Co.*, 216 *N.J. Super.* 347, 358, 523 *A.*2d 712 (1986). On the parties' interlocutory appeal and cross-appeal the Appellate Division affirmed. *Dewey v. Brown & Williamson Tobacco Co.*, 225 *N.J.Super.* 375, 542 *A.*2d 919 (1988). We granted both plaintiff's and Brown & Williamson's motions for leave to appeal, 113 *N.J.* 379, 550 *A.*2d 481 (1988). We now answer the two questions posed above in the negative.

I

In 1982 plaintiff, Claire Dewey, individually and as executrix of her husband's estate, sued R.J. Reynolds Tobacco Co., R.J. Reynolds Industries, Inc., American Brands, Inc., and Brown & Williamson Tobacco Co. Plaintiff's complaint alleged that her husband had developed lung cancer from smoking defendants' cigarettes from 1942 until eight months before his death in 1980. Count one asserted general theories of design defect, including

a claim of inadequate warning, and count two alleged theories of fraud and misrepresentation in advertising. Counts three and four were derivative.

During discovery, plaintiff disclosed that her husband had not smoked defendant Brown & Williamson's cigarettes ("Viceroy") until 1977, thirty-five years after he had started to smoke and eleven years after Congress had enacted the Cigarette Act, which requires that each package of cigarettes carry a warning of the alleged health hazards of smoking. See 15 *U.S.C.* § 1333. Brown & Williamson then moved for summary judgment on two grounds: (1) that the Cigarette Act preempted all of plaintiff's claims, and, alternatively, (2) that the complaint was deficient as a matter of New Jersey substantive law because comment i of Section 402A of the *Restatement of Torts (Second)* (hereinafter Restatement) bars the imposition of strict liability for a product "whose danger is contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics* * *."

The trial court dismissed so much of the first count of plaintiff's complaint as alleged liability for failure to warn, and the entire second count, which alleged fraud and misrepresentation in advertising, on the ground that the Cigarette Act preempts all those claims. 216 *N.J.Super.* at 355, 523 *A.*2d 712. That result was compelled, according to the court, by the Third Circuit's interlocutory decision in *Cipollone v. Liggett Group,* 789 *F.*2d 181 (1986), *cert.* denied, 479 *U.S.* 1043, 107 *S.Ct.* 907, 93 *L.Ed.2d* 857 (1987), which held that the federal Cigarette Act impliedly preempted state-law damage actions that challenge "either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." 789 *F.*2d at 187 (footnote omitted). The Third

Circuit reaffirmed its preemption decision in post-trial proceedings in *Cipollone v. Liggett Group,* 893 *F.*2d 541, 581-82 (1990), with Chief Judge Gibbons concurring "only because this panel is bound" by what he perceived as the court's previous "erroneous opinion." *Id.* at 583.

The trial court in this case, however, did not dismiss plaintiff's design-defect claim on preemption grounds. The court believed that "*Cipollone* made clear that the regulatory scheme of the [Cigarette] Act and the federal interest involved was not so pervasive as to preclude all tort remedies which a plaintiff in smoking and health-related litigation may have under state law." 216 *N.J.Super.* at 356, 523 *A.*2d 712. Plaintiff could pursue a design-defect claim by showing, under the "risk-utility" test for determining design defect, that the risks posed by cigarettes outweighed their utility. She did not have to prove the existence of an alternative, safer design. *Ibid.* The court made no mention of the impact of comment i of *Restatement* Section 402A on the claim that survived preemption.

The Appellate Division affirmed substantially for the reasons expressed by the trial court, subject to "such modifications as intervening law makes necessary," 225 *N.J.Super.*at 377, 542 *A.*2d 919. Specifically, the Appellate Division modified the trial court's decision regarding the design-defect claim by stating that the principles of comment i of the *Restatement* Section 402A were applicable to the case pursuant to *N.J.S.A.* 2A:58C-3a(2), the "defenses" section of the Products Liability Law. *Id.* at 385, 542 *A.*2d 919. Thus, the court had "no quarrel with defendant's proposition that plaintiff may not recover if a factfinder concludes that the death of her decedent was caused in large measure from exposure to the danger inherent in all cigarettes, a danger acknowledged to be within his contemplation of an ordinary

consumer." *Id.* at 386, 542 *A.*2d 919. However, that proposition did not compel a legal conclusion that there was no material issue of fact regarding defendant's ability " 'to minimize the unavoidable [*i.e.* inherent] dangers attendant to cigarette smoking.' " *Ibid.* (quoting 216 *N.J.Super.* at 358, 523 *A.*2d 712). Plaintiff was therefore entitled to present to a factfinder evidence regarding alternative design or, as the Appellate Division described it, evidence "concerning defendant's cigarettes as defendant designed them and decedent smoked them." *Ibid.* The Appellate Division then summarized its holding by stating that although "the jury should not be asked to compare the risks and utility inherent in cigarette smoking nor to make findings of fact concerning whether decedent was adequately warned of those risks, plaintiff should be permitted to go forward with her cause of action." *Id.* 225 *N.J.Super.* at 388, 542 *A.*2d 919.

In addition to granting plaintiff and Brown & Williamson leave to appeal, we allowed defendant R.J. Reynolds Tobacco Company to file a brief and appear as intervenor.

II

Integral to our analysis is a preliminary determination of whether plaintiff's complaint states a claim for design defect. Although our Rules of Court require that "all pleadings must be construed liberally in the interest of justice, *R.* 4:5-7, a party's pleadings must nonetheless fairly apprise an adverse party of the claims and issues to be raised at trial." *Miltz v. Borroughs-Shelving,* 203 *N.J.Super.* 451, 458, 497 *A.*2d 516 (App.Div.1985); *see also Hewitt v. Hollohan,* 56 *N.J.Super.* 372, 377, 153 *A.*2d 371 (App. Div. 1959), ("a vague complaint, full of generalities, frequently indicates that the pleader has not thought through his cause of action, and does not yet know precisely upon what theory

he will present his case"). In *Miltz*, for example, the allegation in a complaint that the plaintiff's injuries were proximately caused by the defendant's "failure to install stairs properly," 203 *N.J.Super.* at 458, 497 *A.*2d 516, was insufficient notice of a negligent-inspection theory of the case. In this case defendants similarly assert that they were not aware of plaintiff's claim for design defect until the summary-judgment motion because plaintiff's second amended complaint omitted the term "design defect."

Although the first count of the second amended complaint does not contain the words "design defect," the complaint does allege that defendants' tobacco products "were not reasonably fit, safe and suitable for human use at the time the products were placed in the stream of commerce"—the talismanic language of a strict-liability claim. *See Suter v. San Angelo Foundry & Mach. Co.*, 81 *N.J.* 150, 176, 406 *A.*2d 140 (1979). Immediately following the foregoing language, the complaint asserts that "Defendants *further* failed to warn the general public and/or Plaintiff's decedent of deleterious, toxic and hazardous nature of their products for numerous years," and that "[t]he unfitness, unsuitableness and unsafeness of the Defendants' products, *along with* the failure of the Defendants to warn and/or convey an adequate warning caused the Plaintiff's decedent to suffer serious, severe, disabling and permanent injuries and death* * *." (Emphasis added.) The quoted language suggests that plaintiff's complaint alleged two distinct categories of defects: one involving the unsuitability of the product for consumption, the other focusing on the warning label. Contrary to Brown & Williamson's claim, it was therefore apparent on the face of the complaint that plaintiff was asserting more than an inadequate-warning claim. Although more by way of facts regarding the design defect would have been enlightening, see *Rule* 4:5-2, we agree with the Appellate Division's finding

that "[t]o the extent that plaintiff's complaint was deficient, the judge properly looked to the entire record, giving plaintiff every favorable inference," 225 *N.J.Super.* at 382 n. 5, 542 *A.*2d 919, and that the trial court had correctly concluded that the complaint was sufficient to support a claim of design defect.

II

— A —

We turn to the issue of whether the federal Cigarette Act preempts any of plaintiff's common-law tort claims. Defendants contend that although the Appellate Division correctly affirmed the trial court's dismissal of plaintiff's inadequate-warning and fraudulent-advertising claims on preemption grounds, the court should also have held that the Cigarette Act preempts plaintiff's alternative design-defect claim. Plaintiff counters that dismissal, on the basis of preemption, of any of the theories alleged in her complaint would represent a misapplication of United States Supreme Court precedent.

Pursuant to the Supremacy Clause of the United States Constitution, article VI, clause 2, Congress may preempt state common law as well as state statutory law through federal leglislation. *Chicago N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 *U.S.* 311, 325-26, 101 *S.Ct.* 1124, 1134, 67 *L.Ed.*2d 258, 270 (1981). The essential question for any preemption analysis is "whether Congress intended that the federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n.*, 476 *U.S.* 355, 369, 106 *S.Ct.* 1890, 1899, 90 *L.Ed.*2d 369, 382 (1986). That inquiry is simple enough when Congress has expressly defined the extent to which the statute preempts state law. *See, e.g., Schneidewind v. ANR Pipeline Co.*,

485 *U.S.* 293, 299, 108 *S.Ct.* 1145, 1150, 99 *L.Ed.*2d 316, 325 (1988). Preemption may nevertheless arise "by implication" when, for instance, "the scheme of federal regulation [may be] so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it," *Rice v. Santa Fe Elevator Corp.*, 331 *U.S.* 218, 230, 67 *S.Ct.* 1146, 1152, 91 *L.Ed.* 1447, 1459 (1947), or when the "object sought to be obtained by federal law and the character of the obligations imposed by it may reveal the same purpose." *Ibid; see Exxon Corp. v. Hunt*, 97 *N.J.* 526, 532-33, 481 *A.*2d 271 (1984). And even in the absence of express language or implied congressional intent to occupy the field, state law may be preempted "to the extent that it actually conflicts with federal law." *Brown v. Hotel Employees Int'l Union*, 468 *U.S.* 491, 501, 104 *S.Ct.* 3179, 3185, 82 *L.Ed.*2d 373, 383 (1984). Examples of "actual conflict" include instances in which compliance with both state and federal regulations is physically impossible, *Florida Lime & Avocado Growers v. Paul*, 373 *U.S.* 132, 142-43, 83 *S.Ct.* 1210, 1217, 10 *L.Ed.*2d 248, 256-57 (1963), or in which state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 *U.S.* 52, 67, 61 *S.Ct.* 399, 404, 85 *L.Ed.* 581, 587 (1941).

Obviously, then, preemption often hinges "on * * * question[s] of statutory construction and interpretation." *Palmer v. Liggett Group*, 825 *F.*2d 620, 623 (1st Cir. 1987); L. Tribe, *American Constitutional Law* at 479-97 (2nd ed.1988) (discussing preemptive effect of federal legislation on state action). That simple point poses a unique issue in this case, because New Jersey precedent appears to hold that state courts are bound by the federal courts' interpretations of federal statutes, *Southern Pac. Co. v. Wheaton Brass Works*, 5 *N.J.* 594, 598, 76 *A.*2d 890 (1950), *cert. denied*, 341 *U.S.* 904, 71 *S.Ct.* 614, 95 *L.Ed.* 1343 (1951), and

because the Third Circuit has already determined that the Cigarette Act preempts failure-to-warn claims as well as claims challenging the context of cigarette advertising. *Cipollone v. Liggett Group, supra*, 789 *F.*2d at 187. Defendants contend that our task is merely to adopt the Third Circuit's reasoning in *Cipollone*, as did the trial court in this case. See 216 *N.J.Super.* at 355, 523 *A.*2d 712. That contention requires us to examine the logic underlying adherence to federal law on the meaning and effect of a federal statute.

In *Wheaton Brass Works, supra*, 5 *N.J.* 594, 76 *A.*2d 890, this Court resolved a dispute over freight charges under the Interstate Commerce Act. Although stating generally, and perhaps imprecisely, that the case required "consideration of the applicable provisions of the Interstate Commerce Act as construed by the federal courts whose decisions on federal problems are controlling," *id.* at 598, 76 *A.*2d 890, the Court was clearly referring to the binding nature of the United States Supreme Court cases and not of lower-federal-court cases. *See West Jersey & Seashore R.R. v. Lake & Risely Co.*, 105 *N.J.L.* 314, 316, 145 *A.* 336 (Sup.Ct. 1929); Note, "Authority in State Courts of Lower Federal Court Decisions on National Law," 48 *Colum.L.Rev.* 943, 944-45 n. 15 (1948). Not since *Wheaton Brass* has this Court ever suggested that lower-federal-court decisions on the interpretation of federal statutes are binding as a matter of law. *But see Urban League v. Mayor of Carteret*, 170 *N.J.Super.* 461, 469, 406 *A.*2d 1322 (App. Div. 1979) (federal-court decisions on the interpretation of federal statutes are binding precedent), *rev'd on other grounds sub nom. Southern Burlington County N.A.A.C.P. v. Mount Laurel*, 92 *N.J.* 158, 456 *A.*2d 390 (1983). Indeed, in *State v. Coleman*, 46 *N.J.* 16, 214 *A.*2d 393 (1965), in which this Court declined to follow the Third Circuit's federal-constitutional analysis in *United States ex. rel. Russo v. New*

Jersey, 351 *F.*2d 429 (1965), we stated generally that

> when adjudicating federal questions, the state courts form an integral part of the national structure and that:
>
> > In that capacity they occupy excactly the same position as the lower federal courts, which are coordinate, and not superior to them. There is no appeal from the state to the lower federal courts. Instead both are subject to the reviewing power of the Supreme Court, which furnishes the unifying principle. Decisions of a lower federal court are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy. [*Id.* 46 *N.J.* at 37, 214 *A.*2d 393 (quoting Note, *supra*, 48 *Colum.L.Rev.* at 946-47).]

Neither *Coleman* nor the article quoted in *Coleman* distinguished between the binding effect of decisions involving constitutional interpretation and those involving statutory interpretation. *See, e.g. Dewey v. Brown & Williamson Tobacco, supra,* 225 *N.J.Super.* at 378, n. 2, 542 *A.*2d 919. Consequently, we reject any such distinction, and clarify that in neither situation are the decisions of the lower federal courts "binding" *per se.*

Instead, the operative principle that informs the discussion is the principle of "judicial comity." Stated simply, lower-federal-court decisions in this area should be accorded due respect, particularly where they are in agreement. See, e.g., State v. Norflett, 67 *N.J.* 268, 286, 337 *A.*2d 609 (1975). By helping to ensure uniformity, judicial comity discourages forum shopping.

Hence, starting with a brief review of the Cigarette Act, we undertake an independent analysis of the federal scheme.

— B —

Perhaps, the most significant event that precipitated the Cigarette Act was the 1964 Surgeon General's Advisory Committee Report, which authoritatively concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." H.R.Rep. No. 449, 89th Cong., 1st Sess. 1, *reprinted in* 1965 "U.S.Code Cong. & Admin. News" 2350, 2351. Specifically, the report found that smoking was related to lung cancer, chronic bronchitis, emphysema, cardiovascular diseases, and cancer of the larynx. The report also concluded that "overwhelming evidence indicates that smoking—its beginning, habituation, and occasional discontinuation—is to a large extent psychologically and socially determined." *Id.* at 2357. Public response to the report was "immediate and vocal." *Palmer v. Liggett Group, supra,* 825 *F.*2d at 622. "[I]n a rush to protect and inform [their] citizens," several states adopted mandatory warning labels for cigarette packages. *Ibid.*

The Federal Trade Commission also responded to the Surgeon General's Advisory Committee report by immediately issuing a notice of proposed rulemaking that would have required a warning to be placed both on packages of cigarettes and in all advertising. *See Banzhaf v. F.C.C.*, 405 *F.*2d 1082, 1089 (D.C.Cir. 1968), *cert. denied,* 396 *U.S.* 842, 90 *S.Ct.* 50, 24 *L.Ed.*2d 93 (1969). Concerned about the potential maze of conflicting regulations, Congress intervened in 1965 to set up a uniform system of warning labels for cigarettes.

Among the significant provisions of the Cigarette Act is the

statement of policy and purpose, which originally provided:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) The public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health. [15 *U.S.C.* § 1331.]

Changes to subsection (1) made in 1984 are not relevant to this appeal.

Section 1333 of the Cigarette Act prescribes the exact language to be placed on the warning label. The label required in the original 1965 enactment was: "Warning: The Surgeon General Has Determined That Cigarette Smoking May Be Dangerous To Your Health." 15 *U.S.C.* § 1333 (1965). That warning was subsequently strengthened in 1970 to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." 15 *U.S.C.* § 1333 (1970). A 1984 revision to that section requires four rotating warnings that specifically describe the

hazards attendant to smoking. 15 *U.S.C.* § 1333 (1984). Thus, the tentative message of the 1965 warning has been replaced by stronger assertions of the dangers of smoking.

Also relevant is the Cigarette Act's preemption section, which provided originally that "no statement relating to smoking and health, other than the statements required by section 1333 of this title, shall be required on any cigarette package." 15 *U.S.C.* § 1334. That preemption provision was amended in 1970 to include additional language:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

— C —

Because we do not write on a clean slate, we briefly examine the slate as it comes to us, beginning with the Third Circuit's decision in *Cipollone v. Liggett Group, supra,* 789 *F.*2d 181. There the court began its analysis by upholding the district court's conclusion that the preemption provision contained in 15 *U.S.C.* § 1334 did not expressly preempt plaintiff's state common-law claims. *Id.* at 185. The court explained that although the preemption provision explicitly prohibits states and federal agencies from requiring any additional warning on cigarette packages, no language refers to the viability of state common-law claims. *Id.* at 185-86. That lack of express guidance, combined with the strong presumption against preemption where state police powers are involved, see *Maryland v. Louisiana,* 451 *U.S.* 725, 101 *S.Ct.* 2113, 2128, 68 *L.Ed.*2d 576, 595 (1981), militated against a finding

of express preemption. *Id.* at 186; *accord Roysdon v. R.J. Reynolds Tobacco Co.*, 849 *F.*2d 230, 234 (6th Cir.1988); *Palmer v. Liggett Group, supra,* 825 *F.*2d at 625.

Consequently, the court examined the principles of implied preemption. As a preliminary matter, the court observed that although informative, the "vast" legislative history of the Cigarette Act was not "wholly dispositive of the issue." 789 *F.*2d at 186. According to the court, the language of the statute was "itself a sufficiently clear expression of congressional intent," making resort to the Act's legislative history unnecessary. *Ibid.*

The Third Circuit focused first on the form of implied preemption commonly known as "occupation of the field." Although Congress clearly intended to occupy *a* field, as evidenced in both the preemption provision and the statement-of-purpose section of the Act, the court found that the scheme created is not " 'so pervasive' [n]or the federal interest 'so dominant' as to eradicate all of the Cipollones' claims." *Ibid.* The court was also unpersuaded that the object of the Act and the character of obligations imposed by it "reveal a purpose to exert exclusive control over every aspect of the relationship between cigarettes and health." *Ibid.* Critical to that finding was the need for a "restrained view" of Congressional intent to preempt the field, because plaintiff's tort action concerned "rights and remedies traditionally defined solely by state law." *Ibid.*

The *Cipollone* court then turned to the second form of implied preemption, termed "actual conflict," which occurs when state law creates "an obstacle to the execution of the full purposes and objectives of Congress." *Id.* at 187 (quoting *Hines v. Davidowitz, supra,* 312 *U.S.* at 67, 61 *S.Ct.* at 404, 85 *L.Ed.* at 587). According to the court, the Cigarette Act "represents

a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the national economy." *Ibid.* Allowing state-law damage claims to proceed would "upset" that balance by effectively requiring manufacturers to change their warning labels. *Ibid.* Consequently, the Court concluded that the Cigarette Act preempts "state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." *Ibid.* (footnote omitted). In addition, it found that the Act preempts all state-law damage claims that necessarily depend on a duty to provide an adequate warning. *Ibid.*

The *Cipollone* rationale found favor with four federal circuit courts: the first, *Palmer v. Liggett Group, supra,* 825 *F.*2d 620; fifth, *Pennington v. Vistron Corp.*,876 *F.*2d 414 (1989); sixth, *Roysdon v. R.J. Reynolds Tobacco Co., supra,* 849 *F.*2d 230, and eleventh, *Stephen v. American Brands,* 825 *F.*2d 312 (1987). There is a consensus, then, at least among federal courts, that the imposition of state tort liability for failure to warn would jeopardize the "delicate" balance of policies enumerated in the Cigarette Act. *See, e.g., Palmer v. Liggett Group, supra,* 825 *F.*2d at 626 ("[i]t is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps a single jury in a single state"). The *Palmer* court stated that "[t]o permit the imposition of state common law actions into a well-defined area of federal regulation would abrogate utterly the established scheme of health protection as tempered by trade protection." *Ibid.*

It should be noted, however, that two of the federal circuit court opinions were reversals of lower-court decisions that had concluded that the Cigarette Act had no preemptive effect. See

Palmer v. Liggett Group, 633 *F.Supp.* 1171 (D.Mass.1986), *rev'd,* 825 *F.*2d 620 (1st Cir.1987); *Cipollone v. Liggett Group,* 593 *F.Supp.* 1146, 1157-63 (D.N.J.1984), *rev'd,* 789 *F.*2d 181. Finding those lower-court decisions to represent the sounder position regarding preemption, the Minnesota Court of Appeals likewise rejected the preemption defense. *Forster v. R.J. Reynolds Tobacco Co.*, 423 *N.W.*2d 691 (1988), *rev'd,* 437 *N.W.*2d 655 (Minn.1989).

Specifically, the intermediate appellate court in *Forster* disagreed with the federal Circuit Courts' approach to preemption, concluding that the traditional presumption against preemption is "heightened" by the following four factors: (1) the Cigarette Act does not explicitly preempt state tort claims, *id.* at 696; (2) the matter involves the state police powers of protecting the health and safety of the public, *id.* at 696-98; (3) the legislative history of the Cigarette Act, which the Third Circuit completely disregarded in *Cipollone*, indicates that Congress did *not* intend to supersede the traditionally state-run area of tort compensation, *id.* at 698-99; and (4) preemption, given its drastic consequences, would effectively eliminate all means of recourse for the plaintiff. *Id.* at 700. The court concluded that "at the very heart of our ruling is the firm conviction that if there is a need to immunize the tobacco industry from tort liability, that decision must be made by Congress in an unambiguous mandate and *not* by the courts." *Id.* at 701.

Like the trial-court decisions in *Cipollone* and *Palmer,* the Minnesota Court of Appeals decision in *Forster* was eventually reversed on appeal. 437 *N.W.*2d 655. The reason for the reversal, the Minnesota Supreme Court explained, was that the imposition of state tort damages for failure to warn "would directly conflict with one of the announced purposes of the Act, namely, to avoid 'diverse, nonuniform, and confusing' regulations relating to

cigarette smoking and health, and would effectively dismantle the federal plan." *Id.* at 659.

— D —

In deciding the preemption issue, we first point out that "the settled mandate" governing preemption of matters traditionally under state supervision "is not to decree such a federal displacement 'unless it was the clear and manifest purpose of Congress.' " *Florida Lime & Avocado Growers v. Paul, supra,* 373 *U.S.* at 146, 83 *S.Ct.* at 1219, 10 *L.Ed.*2d at 259 (quoting *Rice v. Santa Fe Elevator Corp., supra,* 331 *U.S.* at 230, 67 *S.Ct.* at 1152, 91 *L.Ed.* at 1459). Stated differently, "we are not to conclude that Congress legislated the ouster of [traditional common-law remedies] in the absence of an *unambiguous* congressional mandate to that effect." *Id.* 373 *U.S.* at 146-47, 83 *S.Ct.* at 1219, 10 *L.Ed.*2d at 159 (emphasis added); *see, e.g., Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 *U.S.* 707, 715, 105 *S.Ct.* 2371, 2376, 85 *L.Ed.*2d 714, 722 (1985) (presumption exists that state and local regulation of health and safety matters can consitutionally coexist with federal regulation); *Hines, supra,* 312 *U.S.* at 75, 61 *S.Ct.* at 408, 85 *L.Ed.* at 591 (Stone, J., dissenting) (courts must adequately "safeguard against * * * diminution of state power [founded on] vague inferences as to what Congress might have intended if it had considered the matter"); *MacGillivray v. Lederle Laboratories,* 667 *F.Supp.* 743, 745 (D.N.M. 1987) ("[i]t would be rare indeed to infer an intent to supersede tort actions involving rights and remedies traditionally defined exclusively by state law"); Sunstein, "Interpreting Statutes in the Regulatory State," 103 *Harv.L.Rev.* 405, 417 (pointing to "shared understandings about the limited preemptive effect of federal enactments").

The preemption arguments advanced by defendants are premised not on a clear showing of congressional intent but rather

on dubious inferences and assertions. We agree with those courts that hold that the Cigarette Act neither expressly preempts common-law remedies nor impliedly preempts those remedies by pervasively occupying the field of law. Nor is there any indication that compliance with both state and federal law is impossible. *See Pennington v. Vistron Corp., supra,* 876 *F.*2d at 418-21; *Roysdon v. R.J. Reynolds Tobacco Co., supra,* 849 *F.*2d at 234; *Palmer v. Liggett Group, supra,* 825 *F.*2d at 625-26; *Cipollone v. Liggett Group, supra,* 789 *F.*2d at 185-87; *Forster v. R.J. Reynolds, supra,* 437 *N.W.*2d at 659-60. We part company, however, with the cited cases to the extent that they conclude that state-law claims for inadequate warning "actually conflict" with the purposes of the Cigarette Act.

Preemption by "actual conflict," as explained in *Hines v. Davidowitz, supra,* 312 *U.S.* 52, 61 *S.Ct.* 399, 85 *L.Ed.* 581, occurs in those instances in which, as a result of the operation of state law, "the purpose of the [federal] act cannot otherwise be accomplished—[] its operation within its chosen field else must be frustrated and its provisions be refused their natural effect • • •." *Id.* at 68 n. 20, 61 *S.Ct.* at 404 n. 20, 85 *L.Ed.* at 587 n. 20. In contrast to express and implied preemption, the "actual conflict" analysis is "more an exercise of policy choices by a court than strict statutory construction." *Abbot by Abbot v. American Cyanamid Co.,* 844 *F.*2d 1108 (4th Cir.1988). The test is straightforward: first, a court must consider the purposes of the federal law, and second, it must evaluate the effect of state law on those purposes. *Finberg v. Sullivan,* 634 *F.*2d 50, 63 (3rd Cir.1980). Actual conflict must be more than "hypothetical" or "potential." *Rice v. Norman Williams Co.,* 458 *U.S.* 654, 659, 102 *S.Ct.* 3294, 3299, 73 *L.Ed.*2d 1042, 1049 (1982).

The Cigarette Act's statement of policy and purpose

announces two separate goals: (1) "to adequately inform[] [the public] that cigarette smoking may be hazardous to health by [the] inclusion of a warning to that effect on each package of cigarettes," and (2) to protect "commerce and the national economy • • • to the maximum extent *consistent* with this declared policy [by] not imped[ing it with] diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 *U.S.C.* § 1331 (emphasis added). It is significant that the second goal, the protection of trade and commerce, must be achieved "consistent with" and not "to the detriment of" the first and principal goal—to inform the public adequately that cigarettes may be hazardous to health. H.R.Rep. No. 449, 89th Cong., 1st Sess. a, *reprinted in* "1965 U.S.Code Cong. & Admin.News" 2350 (noting that the Act's "principal purpose" was to "provide adequate warning to the public of the potential hazards of cigarette smoking by requiring the labeling of cigarette packages with the [warning]"). Moreover, the secondary goal focuses on the need for uniform labeling and advertising *regulations* as a way of protecting commerce and the national economy;, but does not go so far as to restrict the rights of injured consumers.

The question here is whether state common-law tort remedies will have the effect of creating "an obstacle to the accomplishment and execution of [those] purposes." *Hines, supra,* 312 *U.S.* at 67, 61 *S.Ct.* at 404, 85 *L.Ed.* at 587. It is clear that the allowance of such remedies will further, not impair, the goal of adequately informing the public of the risks of cigarette smoking. It is instead the second federal goal—the protection of trade and commerce through uniform regulations—that according to defendants will be thwarted if tort claims are allowed to proceed. Specifically, defendants contend that the practical effect of a tort damage award is that it "imposes" a "requirement" on the manufacturer to change its warning label from the one federally prescribed, because

"[o]nce a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability." *Palmer v. Liggett Group, supra,* 825 *F.*2d at 627-28. According to defendants, preemption occurs because the incidental regulatory pressure exerted by a jury verdict would necessarily conflict with the goal of uniform regulations.

In other contexts the United States Supreme Court has commented on the regulatory effect of state damage actions. For example, in holding that the provisions in the National Labor Relations Act preempted a state common-law action for business losses associated with union picketing, the Court stated:

> Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy * * *.
>
> [*San Diego Trades Council v. Garmon,* 359 *U.S.* 236, 246-47, 79 *S.Ct.* 773, 780, 3 *L.Ed.*2d 775, 784 (1959).]

The quoted language has limited applicability, however, in view of the presumption in favor of federal preemption where the National Labor Relations Board (NLRB) is involved. *Brown v. Hotel Employees, supra,* 468 *U.S.* at 502, 104 *S.Ct.* at 3185, 82 *L.Ed.*2d at 384. The *Garmon* Court was also concerned that the

primary jurisdiction of the NLRB would be impaired if litigants were permitted to sidestep its remedial scheme by pursuing state-law claims.

More recently in *Silkwood v. Kerr-McGee Corp.,* 464 *U.S.* 238, 104 *S.Ct.* 615, 78 *L.Ed.*2d 443 (1984), the United States Supreme Court decided that the Atomic Energy Act, 42 *U.S.C.* §§ 2011-2284 (1982 & Supp. III 1985), did not preempt a state-authorized award of punitive damages even though the Act exclusively regulated the field of nuclear safety. In rejecting defendant's argument that the imposition of punitive damages would be tantamount to imposing a safety regulation, the Court stated:

> It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequences was something that Congress was quite willing to accept. [Id. at 256, 104 *S.Ct.* at 625, 78 *L.Ed.*2d at 457.]

Silkwood is relevant because it suggests that Congress may be willing to tolerate the regulatory consequences of the application of state tort law even where direct state regulation is preempted. *See, e.g., Goodyear Atomic Corp. v. Miller,* 486 *U.S.* 174, 186, 108 *S.Ct.* 1704, 1712, 100 *L.Ed.*2d 158, 171 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not"). And just this term in *English v. General Electric Co.,* ____*U.S.*____, 110 *S.Ct.* 2270, 110 *L.Ed.*2d 65 (1990), the Court held that a nuclear-plant employee's state-law claim for intentional infliction of

emotional distress based on employer's alleged retaliatory firing for plaintiff's "whistleblowing" did not conflict with federal regulations or specific remedies of the Energy Reorganization Act, despite tangential effect on their purposes, and hence was not preempted by federal law. Both *Silkwood* and *English*, therefore, pose an obstacle to defendants' "actual conflict" analysis, which is premised solely on the assertion that Congress could never have intended to tolerate such tension. *See also Cipollone, supra,* 789 *F.*2d at 187 (because several Supreme Court opinions recognize the regulatory effect of state-law damage claims, see, *e.g., Garmon, supra,* 359 *U.S.* 236, 79 *S.Ct.* 773, 3 *L.Ed.*2d 775, state-law claims arising under the Cigarette Act are *ipso facto* preempted). We refuse to accept that assumption as the foundation for an "unambiguous Congressional mandate" to preempt state common law.

Instead, in order to determine whether the goal of uniformity will be impaired, we prefer to scrutinize the actual extent to which state-law damage claims have a "regulatory effect". Although liability may indirectly provide incentives to change behavior, the form of such change is never dictated by a court unless, of course, it be by way of injunctive or declaratory relief. *Cipollone v. Liggett Group, supra,* 593 *F.Supp.* at 1154; *see also* Garner, "Cigarette Dependency and Civil Liability: A Modest Proposal," 53 *S.Cal.L.Rev.* 1423, 1454 (1980) ("a damages award * * * requires only payment—it is not an injunction requiring the defendant to incorporate into its advertising a fixed legend different from the federally required label"). In this case a manufacturer that incurs a judgment of liability may change its conduct by (1) adding an additional warning (which would not be barred under the Cigarette Act because the preemption section provides that no statement shall be "required," hence, there is no prohibition against a manufacturer "voluntarily" saying more); or (2) placing

a package insert in the product, as has been done with a multitude of products; or (3) simply choosing to do nothing and risking exposure to liability. "The decision * * * to choose whichever path is most prudent—is up to the industry. In either case, as long as it continues to meet the requirements of Federal law, it is free to meet its state-imposed obligations to its customers as it sees fit." Tribe, "Federalism With Smoke and Mirrors," *The Nation*, June 7, 1986, at 788. Defendants overstate the regulatory pressure that state-law damage claims would generate.

More significantly, defendants' analysis completely ignores the fact that state-tort claims advance a substantial goal apart from regulating behavior: to provide compensation to those injured by deleterious products when that result is consistent with public policy. *See, e.g., Feldman v. Lederle Laboratories,* 97 *N.J.* 429, 461, 479 *A.*2d 374 (1984) ("[T]here is a strong state interest in compensating those who are injured by a manufacturer's defective products"); *O'Brien v. Muskin Corp.,* 94 *N.J.* 169, 179, 463 *A.*2d 298 (1983) (strict liability is premised on a shared concern about allocating the risk of loss on those in the stream of commerce for injuries sustained from unsafe products); *Suter v. San Angelo Foundry & Mach. Co., supra,* 81 *N.J.* at 173, 406 *A.*2d 140 ("Strict liability * * * is but an attempt to minimize the costs of accidents and to consider who should bear those costs"). That goal was similarly iterated in *Ferebee v. Chevron Chemical Co.,* 736 *F.*2d 1529, *cert. denied,* 469 *U.S.* 1062, 105 *S.Ct.* 545, 83 *L.Ed.*2d 432 (1984), in which a worker alleged that Chevron, despite compliance with the labeling requirements of the Federal Insecticide Fungicide and Rodenticide Act, 7 *U.S.C.* § 136-136y ("FIFRA"), had failed adequately to warn that long-term skin exposure to paraquat could cause serious lung disease. In response to Chevron's argument that FIFRA preempts state tort suits for inadequate warnings, the court found that state tort law "may have broader

compensatory goals" than the federal scheme, and that

> even if the ultimate purposes of federal and state law in this area are the same, a state (acting through its jurors) may assign distinct weight to the elements which go into determining whether a substance as labelled is of sufficient net benefit as to warrant its use. * * * [Thus] a state may choose to tip the scales more heavily in favor of the health of its citizens than EPA is permitted to by FIFRA. [736 *F.*2d at 1540].

In rejecting Chevron's contention that the exclusive "regulatory aim" of FIFRA would be frustrated by state damage actions, the court stated:

> Damage actions typically, however, can have *both* regulatory and compensatory aims. Moreover, these aims can be distinct; it need not be the case, as Chevron apparently assumes, that the company can be held liable for failure to warn only if the company could actually have altered its warning. * * * In this case, a Maryland jury found that the EPA-approved label did not sufficiently guard against certain injuries. Even if Chevron could not alter the label, Maryland could decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for injuries that could have been prevented with a more detailed label that that approved by the EPA. That is, Maryland can be conceived of as having decided that, if it must abide by EPA's determination that a label is adequate,

> Maryland will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented had Maryland been allowed to require a more detailed label or had Chevron persuaded EPA that a more comprehensive label was needed. [Id. at 1541 (emphasis added).]

Similarly, in .his case, a New Jersey jury could decide that a cigarette manufacturer, rather than an injured party, ought to bear the cost of injuries that could have been prevented with a more detailed warning label than that required under the Cigarette Act. *Cf. Freund v. Cellofilm Properties, Inc.*, 87 *N.J.* 229, 238 n. 1, 432 *A.*2d 925 (1981) (explaining different approaches in inadequate-warning cases). We think that our citizens are entitled at least to the opportunity to present such a claim.

Like cigarettes, paraquat has been "extensively regulated since 1966 by the federal government." *Ferebee v. Chevron Chem. Co., supra,* 736 *F.*2d at 1532. The insecticide can be sold in the United States only when accompanied by a label approved by the EPA. *Id.* at 1539. Moreover, FIFRA contains a preemption section, which provides that a "State shall not impose or continue in effect any requirement for labeling* * * in addition to or different from those required under this subchapter." 7 *U.S.C.* § 136v(b). No doubt such a provision was intended to promote a similar goal of uniformity.

The *Ferebee* case prompts an additional observation: defendants' "implied preemption through incidental regulatory effect" analysis is equally applicable to the myriad of other federal labeling statutes and regulations that have as their foundation an express or implied goal of uniform labeling. The United States Food and Drug Administration (FDA), for example, prescribes

warnings to be used on oral contraceptives to ensure that patients are "fully informed of the benefits and risks involved in the use of these drugs," 43 *Fed.Reg.* 4220 (1978); 21 *C.F.R.* § 310.501(a)(1984), and requires "precise and nationally uniform" labeling in that respect. 21 *C.F.R.* § 301.501(a)(2)(1) (1984). Defendants' analysis could just as easily apply to those regulations and thereby shield drug manufacturers from liability based on their compliance with labeling requirements, notwithstanding the fact that contraceptive users may not have been warned of the inherent risks of the product. Compliance with FDA labels on oral contraceptives, however, does not shield manufacturers from liability. *MacDonald v. Ortho Pharmaceutical Corp.*, 394 *Mass.* 131, 475 *N.E.*2d 65, 70 (1985).

Another analogous statute is the Federal Hazardous Substances Act (FHSA), 15 *U.S.C.* § 1261 et seq., which requires that hazardous household substances sold in interstate commerce have a label containing specific warnings and instructions. 15 *U.S.C.* § 1261(p), 1262, 1263. That Act provides that states may not establish or continue "a requirement applicable to such substance * * * unless such requirement is identical to the warning established pursuant to the Act." Pub.L. 94-284, § 17(a), 90 Stat. 510 (1976). Defendants' argument suggests that complicance with the FHSA would preclude a finding of negligence for failure to give additional warnings. The FHSA, however, prescribes only the minimum warning. It does not immunize the manufacturer of a hazardous product from failure to supply an adequate warning. *Burch v. Amsterdam Corp.*, 366 *A.*2d 1079, 1085 (D.C.1976).

Finally, defendants contend that the Cigarette Act preempts plaintiff's design-defect claims because those claims would necessarily disturb the balance struck by Congress between its

concern for the health of Americans and for the health of the tobacco industry. We find no legislative or judicial support for the proposition that Congress engaged in its own risk-utility analysis and decided that cigarettes were not defectively designed.

We are persuaded by the view most forcefully stated by Solicitor General Kenneth Starr, in his unpublished monograph "The Law of Preemption," that "[o]ur federal system, with its high regard for the several States' powers of governance, requires that judges not preempt state laws lightly." *Id.* at 61. Judge Starr recalls Justice Frankfurter's observation that when the Supreme Court considers whether the Congress has preempted state law, ' "[a]ny indulgence in construction shouid be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority.' " *Id.* at 86 [quoting *Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 *U.S.* 767, 780, 67 *S.Ct.* 1026, 1033, 91 *L.Ed.*2d 1234, 1249 (1947)]. We are convinced that had Congress intended to immunize cigarette manufacturers from packaging, labeling, misrepresentation, and warning claims, it knew how to do so with unmistakeable specificity.

We hold that the Cigarette Act does not preempt plaintiff's claims.

III

We focus now on the second issue on this appeal, namely, whether the New Jersey Products Liability Law, which is *N.J.S.A.* 2A:58C-3a(2) provides a defense to manufacturers and sellers for harms caused by products whose dangerous propensities are known to the ordinary user, can retroactively insulate these defendants from liability for design defects inherent in their cigarettes.

Appendix G

New Jersey's tort-reform statute, which became effective after the trial court's decision in this case, was intended to "establish clear rules [in] actions for damages for harm caused by products, including certain principles under which liability is imposed and the standards and procedures for the award of punitive damages." *N.J.S.A.* 2A:58C-1. The Products Liability Law was not intended to "codify all issues relating to product liability, but only to deal with matters that require clarification." *Ibid.* The Products Liability Law leaves unchanged the three theories under which a manufacturer or seller may be held strictly liable for harm caused by a product—defective manufacturers, defective design, and defective warnings—as well as the definition of duty: "a manufacturer or seller of a product shall be liable * * * if the product causing the harm was not reasonably fit, suitable or safe for its intended purpose." *N.J.S.A.* 2A:58C-2, *see Suter v. San Angelo Foundry & Mach. Co., supra,* 81 *N.J.* at 169, 406 *A.*2d 140.

The new statute, however, establishes new rules regarding the burden of proof and the imposition of liability. Those changes are not to be applied to products-liability actions instituted on or before the date of enactment, a category that includes this case. *L.*1987, *c.* 197, § 8. That provision reinforces the presumption in New Jersey favoring the prospective application of a statute, *Gibbons v. Gibbons,* 86 *N.J.* 515, 432 *A.*2d 80 (1981), as well as the requirement that "a statute [that] changes the settled law and relates to substantive rights is prospective only, unless there is an unequivocal expression of contrary legislative intent." *Pennsylvania Greyhound Lines v. Rosenthal,* 14 *N.J.* 372, 381, 102 *A.*2d 587 (1954). More importantly, it simplifies the issue of retroactivity because the only inquiry is whether section 3a(2) is a codification of existing common law or a "new rule" of strict tort liability for defective products. This Court's precedent

Appendix G

persuades us that *N.J.S.A.* 2A:58C-3a(2) is a "new rule."

Section 3a(2) provides in part as follows:

> a. In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:
>
> * * *
>
> (2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended, except that this paragraph shall not apply to industrial machinery or other equipment used in the workplace and is not intended to apply to dangers posed by products such as machinery; or equipment that can feasibly be eliminated without impairing the usefulness of the product.

The foregoing "hybrid" provision combines the "consumer expectations" doctrine for determining whether a product is defective, *see O'Brien, supra,* 94 *N.J.* at 182, 463 *A.*2d 298, with the obvious-danger factor of the risk-utility analysis, *see Campos v. Firestone Tire & Rubber Co.,* 98 *N.J.* 198, 206-07, 485 *A.*2d 305 (1984), to create a defense to a design-defect claim. In enacting that provision, the legislature drastically changed the method of

analyzing products-liability cases. Specifically, the provision has overturned so much of our decisions in *Suter v. San Angelo Foundry & Mach. Co., supra,* 81 *N.J.* at 170-71, 406 *A.*2d 140, and *O'Brien v. Muskin Corp., supra,* 94 *N.J.* at 181-82, 463 *A.*2d 298, as endorsed the application of the "risk-utility" analysis when a plaintiff is unable to establish a defect under the "consumer expectations" test. That change is easily demonstrated by the trial court's opinion in this case, which relied on *O'Brien* to allow plaintiff's claim to proceed on a risk-utility theory irrespective of whether the "consumer expectations" test was satisfied:

> In *O'Brien*, the Supreme Court endorsed the use of risk-utility analysis since it "provides the flexibility necessary for an appropriate adjustment of the interests of manufacturers, consumers and the public." 94 *N.J.* at 183, [463 *A.*2d 298]. Moreover, the *O'Brien* court made clear that in a design-defect case containing a claim that a product is unavoidably unsafe, manufacturers cannot insulate themselves from liability merely by placing warnings on their products [216 *N.J. Super.* at 357, 523 *A.*2d 712.]

Hereafter, under the Products Liability Law, the consumer-expectations test cannot be avoided in a claim for design defect.

Section 3a(2) also modifies the method of analyzing "obvious danger" as established in *Campos v. Firestone Tire & Rubber Co., supra,* 98 *N.J.* 198, 485 *A.*2d 305:

> Although some jurisdictions have adopted an "obvious danger rule" that would absolve a manufacturer of a duty to warn of dangers that

> are objectively apparent, in our state the obviousness of a danger, as distinguished from a plaintiff's subjective knowledge of a danger, is merely one element to be factored into the analysis to determine whether a duty to warn exists. [*Id.* at 207, 485 *A.*2d 305.]

Instead of representing a single factor in analysis, "obvious danger" has now been transformed into a defense, except in instances involving industrial machinery or other workplace equipment. See *Suter v. San Angelo Foundry & Mach. Co., supra,* 81 *N.J.* at 160-68, 406 *A.*2d 140.

Defendant's argument that section 3a(2)'s adoption of *Restatement* Section 402A's comment i represents a mere codification of New Jersey common law, and hence is entitled to retroactive application, likewise must fall. Comment i defines the term "unreasonably dangerous" by stating that

> [m]any products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk or harm, if only from over-consumption. • • • That is not what is meant by "unreasonably dangerous" in this Section. *The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.* • • • Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.

Appendix G

The "good tobacco" example included in comment i has never been adopted by this Court. Even though in *Cepeda v. Cumberland Engineering Co.*, 76 *N.J.* 152, 170, 386 *A.*2d 816 (1978), this Court stated in *dicta* that comment i

> explains that the qualification "unreasonably dangerous" was meant to negate the notion that products normally useful, such as sugar, whiskey, tobacco, or butter, could be regarded as defective because, if used improperly, excessively or in an adulterated condition, they could also be harmful.

The Court never embraced that proposition as a statement of New Jersey law. *See Suter, supra,* 81 *N.J.* at 187, 406 *A.*2d 140 (concurring opinion) (in *Cepeda* the Court's "definitional treatment of 'defective condition unreasonably dangerous' [did not] rest in any measure on Comments g and i of Res.2d sec. 402A"). Moreover, the only element of comment i that appears to have survived *Suter* is the "consumer expectations" test itself. The language "defective condition unreasonably dangerous," which comment i was intended to define, has been struck from this State's legal vocabulary, *Suter, supra,* 81 *N.J.* at 175, 406 *A.*2d 140, because the terminology imposed an unwarranted "dual burden" on the plaintiff to prove both "defective condition" and "unreasonably dangerous." *Id.* at 175, 406 *A.*2d 140. That terminology seemed to suggest

> that recovery in a products liability action should be permitted *only* if a product is more dangerous than that contemplated by the average consumer, [which would] permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer's responsibility for injuries

Appendix G

> caused by that product. [*Barker v. Lull Eng'g Co., Inc.*, 20 *Cal.*3d 413, 425, 573 *P.*2d 443, 451, 143 *Cal. Rptr.* 225, 233 (1978)]

Indeed, if any trend is apparent, it is this Court's reluctance to adhere to the restrictive language in comment i's formulation of strict liability, which would of course include the "good tobacco" example.

As a last resort, defendants turn to the legislative history of the Products Liability Law to support its assertion that comment i in its entirety has been embraced by this Court. The Assembly Insurance Committee Statement to Senate, No. 2805, explains that

> certain provisions of the act simply codify the existing common law of the State, which should continue to apply in pending cases as well as new cases. For example, section 2 states that the burden is on the claimant in a product liability action to prove by a preponderance of the evidence that the product is defective. This is the rule under the existing common law. *Similarly, the New Jersey courts have adopted certain provisions of the commentary to the American Law Institute's "Restatement (Second) of Torts," (e.g., comments i and k to section 402A) that are codified in this act.* (Emphasis added.)

Defendants add that even if the Assembly Insurance Committee was incorrect in its assessment of the common law, its statement must be construed as evidence of the legislature's intent that section 3a(2) apply to pending cases—an argument that the federal district court in *Cipollone* found persuasive, despite that court's conclusion

that *N.J.S.A.* 2A:58C-3a(2) did not codify existing common law. See *Cipollone v. Liggett Group, supra,* 893 *F.*2d at 577.

Putting aside the legislature's interpretation of common law, the Assembly Insurance Committee Statement is not inconsistent with our position. Citing comment i as an example, it asserts that *certain* provisions in the *Restatement's* commentary were adopted prior to the Products Liability Law. As previously discussed, in *Suter, supra,* 81 *N.J.* at 171, 406 *A.*2d 140, this Court did adopt comment i to the extent that it encompassed the "consumer expectations" test. Because we read the Assembly Committee's Statement as no more than an acknowledgement of that fact, we do not find support for the assertion that a wholesale adoption of comment i is mandated by the Committee's innocuous reference.

Having concluded that section 3a(2) of the Products Liability Law does not codify existing common law, and hence is inapplicable, we are left with the remaining argument that as a matter of public policy this Court should immunize cigarette manufacturers from liability for the harm caused by their products by finding that no duty exists. *See, e.g., Cepeda v. Cumberland Eng'g Co., supra,* 76 *N.J.* at 173, 386 *A.*2d 816 ("before determining whether the case for liability should be given to the jury[,] the trial court should give consideration to whether a balanced consideration of factors did not preclude liability as a matter of law"). That argument has two premises: first, the public has long been aware of the health risks of smoking because of advocacy campaigns and the efforts of the United States Surgeon General. *See, e.g., Roysdon v. R.J. Reynolds Tobacco Co., supra,* 623 *F.Supp.* at 1192, (taking judicial notice of the widespread public understanding of the dangers inherent in smoking and concluding that plaintiffs did not make a *prima facie* case that cigarettes are defective), *aff'd,* 840 *F.*2d 230. *See generally* Crist

& Majoras, "The 'New Wave' in Smoking and Health Litigation—Is Anything Really So New?," 54 *Tenn.L.Rev.* 551, 554-58 (arguing that the "long-term and widespread awareness" of the risks attributed to cigarettes precludes any finding that cigarettes are defective). Second, because consumers are aware of the risks of smoking, they are the cheapest cost-avoiders.

Defendants' argument completely ignores the extensive efforts of the tobacco manufacturers to saturate the public with information regarding the benefits of cigarette smoking, the aim of which is to rebut the assertions of public-health advocates and the Surgeon General. We note that in the ensuing quarter-century since the 1964 Surgeon General's Advisory Committee Report, government interest in the societal cost and hazards of smoking has not abated. A bill recently introduced in Congress would provide for grants for advertisements to discourage smoking, the sponsor charging that "tobacco companies target[] women, teenagers and minority groups for their new products and advertising." New York Times, Feb. 21, 1990, at A18. Public opinion surveys as well as Federal Trade Commission reports suggest that the tobacco companies' efforts at rebuttal have been successful, thus raising a material issue of fact regarding consumer awareness of the dangers of smoking. Federal Trade Commission, *Report to Congress, Pursuant to the Federal Cigarette Labeling and Advertising Act,* June 30, 1967. We are unable, therefore, to decide that as a matter of public policy, manufactureres of cigarettes should be immunized from liability for the harms caused by their products. That decision is consistent with the general policy in New Jersey of "liberally favoring jury resolution of defectiveness issues • • • in products liability caes." *Huddell v. Levin,* 537 *F.*2d 726, 736 (3rd Cir.1976).

In sum, our decision today alters the Appellate Division

decision by overturning the dismissal of plaintiff's failure-to-warn and misrepresentation claims, because we conclude that the Cigarette Act does not preempt such claims. We agree, however, with the Appellate Division's refusal to apply the "comment i" example relating to tobacco and with its decision to allow plaintiff's design-defect claim to proceed under the risk-utility analysis. We therefore refuse to apply *N.J.S.A.* 2A:58C-3a(2) retroactively to eliminate plaintiff's design-defect claim

Judgment affirmed in part, reversed in part. We remand the cause to the Law Division.

ANTELL, P.J.A.D. (temporarily assigned), concurring in part, dissenting in part.

I respectfully dissent from the conclusion that the labeling requirement of the Federal Cigarette Labeling and Advertising Act, 15 *U.S.C.A.* § 1333 (hereinafter "the Act"), does not preempt state court product liability actions based on claims of cigarette-caused injury to health that challenge the adequacy of manufacturers' warnings. I concur with the determination that the "obvious danger"/"consumer expectations" standard contained in the New Jersey Product Liability Act, *N.J.S.A.* 2A:58C-3a(2), is not applicable to cases such as this which were pending at the time of the statute's enactment. I also concur that the applicability of lower federal court decisions on the question of preemption must be made on principles of judicial comity and not *stare decisis.*

The majority correctly states that in the interpretation of federal statutes principles of comity dictate that lower federal court decisions "be accorded due respect, particularly where they are in agreement. [citation omitted]. Judicial comity helps to ensure

uniformity and hence discourages forum shopping." From this posture the Court then undertakes its "independent analysis of the federal scheme," and inquiry in which it rejects the well-reasoned, unanimous determinations of the five federal Circuit courts of Appeal and the Supreme Court of Minnesota which all conclude that Congress has preempted the question of adequate warnings concerning the use of cigarettes. So much for comity.

The Act's twofold concern is to inform the public of the health hazards posed by cigarette smoking without exposing "commerce and the national economy" to the confounding effects of "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 *U.S.C.A.* § 1331. Accordingly, at the time relevant to this case the Act mandated that this be accomplished by requiring that the following statement conspicuously appear on each package of cigarettes: "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health." 15 *U.S.C.A.* § 1333.

15 *U.S.C.A.* § 1334 is entitled "Preemption." It provides

> (a) No statement relating to smoking and health, other than the statement required by Section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Appendix G

The structure of the majority's holding merits close attention. It rests on the premise that the Act permits the states to compromise the federal goal of protecting commerce and the national economy in order to further inform the public about the hazards of smoking. Its rationale is that the protection of trade and commerce is a "secondary goal" because it "must be achieved 'consistent with' and not 'to the detriment of' the first and principal goal." Therefore, allowing challenges to the adequacy of warnings in state court proceedings does not conflict with the federal statute since its "principal goal" of adequately warning the public will be thereby better served.

As to the "secondary goal" of immunizing the cigarette industry from state regulation, the Court reasons that the impact of adverse jury verdicts based upon inadequate warnings constitutes only incidental regulatory pressure. Because "incidental regulatory pressure is acceptable, whereas direct regulatory authority [such as an injunction or declaratory relief] is not," the Act's prohibition against further regulation is not breached by challenges to the adequacy of warnings in state court product liability actions. The cigarette manufacturer, states the majority, is free to decide how it shall respond to such liability verdicts, that is, whether to modify the warnings or simply ignore the import of the verdicts.[1]

The other justification given for diminishing the protection Congress accorded commerce and the national economy is that it allows for the socially desirable objective of placing the risk of loss upon the one best able to bear it.

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1. A choice "akin to the free choice of coming up for air after being under water." *Palmer v. Liggett Group Inc.*, 825 *F.*2d 620, 627 (1st Cir.1987). The argument was there described as having been "disingenuously" maintained. *Ibid.*

Appendix G

It can be seen that the Court's holding is vitally dependent upon its assumption that under the Act one goal is subordinate to the other and that state courts may imporove upon the warning statements required by Congress at the expense of commerce and the national economy. This is not what the Act says.

In limiting its attention to the statutory condition expressed in 15 *U.S.C.A.* § 1331 that protection of commerce and the national economy be "consistent with" the policy of adequate warnings, the Court overlooks the larger context of the declared congressional policy. 15 *U.S.C.A.* § 1331 states that policy "and the purpose of this chapter" to be the establishment of "a comprehensive Federal program to deal with cigarette labeling . . . whereby" the public may be adequately informed and commerce may be protected. The word "whereby," relates to "Federal program." Thus, the Act itself creates the very "program . . . whereby" commerce is given protection "to the maximum extent consistent with" warning the public. It not only sets forth the dual policy in the abstract, but also the bright-line warning language which forms the literal mechanics of its implementation. The preemption declaration of 15 *U.S.C.A.* § 1334 tells us that Congress wrote the language of the labeling requirement into 15 *U.S.C.A.* § 1333 to express its exclusive judgment as to how the competing values should be balanced. The Act leaves no doubt as to what warning should be given and how great an intrusion must be tolerated by commerce. Implicit in this is the conclusion that any attempted modification of that balance "under State law" would be in actual conflict with federal law. This is precisely the point of the federal circuit court decisions and the decision of the Supreme Court of Minnesota in *Forster v. R.J. Reynolds Tobacco Co.*, 437 *N.W.*2d 655 (1989), in applying the Act's preemption provision.

Appendix G

In *Palmer v. Ligget Group, Inc.*, 825 *F.*2d 620, 626 (1st Cir.1987), the Court noted that the Cigarette Labeling Act was passed after

> a hard-fought, bitterly partisan battle in striking the compromise that became the Act. It is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state.

It was there held "that a suit for damages on a common law theory of inadequate warning—if the warning given complies with the Act—disrupts excessively the balance of purpose set by Congress, and is thus preempted." *Ibid.* As the Supreme Court of Minnesota reasoned in *Forster, supra,*

> The best indication of congressional intent, we think, is what Congress said in the statute. Congress said it wanted to avoid diverse, nonuniform, and confusing regulations. This statement of intent is at odds with plaintiffs' claim that Congress contemplated a diversity of conflicting state regulations coexisting with the federal regulatory scheme, or that Congress intended its warning to be a minimal warning to which a state could add further requirements. [*Forster,* 437 *N.W.*2d at 660] [Footnote omitted]

See also Cipollone v. Liggett Group, Inc., 789 *F.*2d 181, 186 (3d Cir.1986) ("Even more important, we find the language of the statute itself a sufficiently clear expression of congressional intent without resort to the Act's legislative history.")

Appendix G

The majority states that the Act's "secondary" goal of protecting commerce "focuses on the need for uniform labeling and advertising *regulations* as a way of protecting commerce and the national economy, but does not go so far as to restrict the rights of injured consumers in achieving that goal." The emphasis on "regulations" is presumably used to suggest that the preemption provision is addressed solely to formal regulations promulgated by state administrative or legislative authority.[2] I disagree that Congress intended to shelter cigarette manufacturers only from further governmental regulation but yet leave them answerable to multifarious claims of inadequate warnings limited only by the resourcefulness of counsel and expert witnesses. Such claims would expose the cigarette industry to more "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" that could ever be expected from state governmental authority.

Moreover, claims of inadequate warning asserted in state court liability actions are pernicious in a sense not shared by governmental regulations. They are asserted after the fact, when compliance by the manufacturer is no longer possible to avoid the consequences of a particular suit. Regulations promulgated by state authority, once complied with, impose no duty on a manufacturer to respond in compensatory or punitive damages.

It is obvious that the congressional intent could not have been limited to protecting the industry from state regulatory action

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2. Although the word "regulations" is used in the Act's Declaration of Policy, 15 *U.S.C.A.* § 1331, the prohibition contained in 15 *U.S.C.A.* § 1334 is actually more broadly stated to extend to any requirements and statements relating to smoking and health "other than the statement required by section 1333 of this title." It should be noted that the preemption provision of § 1334(b) prohibits any further requirement "under State law." It did not limit itself to statutory law and is plainly intended to encompass judicial determinations.

while leaving it open to the indirect regulation implicit in product liability suits based on claims of inadequate warning. Both have the proscribed regulatory effect. *San Diego Bldg. Trades Council v. Garmon*, 359 *U.S.* 236, 246-247, 79 *S.Ct.* 773, 780, 3 *L.Ed.*2d 158, 171 (1988) for the proposition that "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not," that decision more pertinently demonstrates that when Congress chooses to allow for "incidental regulatory pressure" it knows how to do so. It did not do so in this statute. As the Court said in *Cipollone v. Liggett Group, Inc.*, 789 *F.*2d at 187,

> Applying this principle [that State law damage claims have a regulatory effect], we conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act.

See also Roysdon v. R.J. Reynolds Tobacco Co., 849 *F.*2d 230, 234 (6th Cir.1988).

Furthermore, I can make no sense of a federal statute which would preclude state legislatures from requiring further minimal warnings, but allow private litigants to run riot with claims of inadequate warnings—claims which might never have come into existence if local lawmakers had been permitted to act in the first place. Had Congress intended to permit litigants to assert these claims on a case-by-case basis there would be no reason to prohibit state legislatures from requiring warnings, in addition to those specified by the Act, to protect consumers from the very injury

for which they later sue.

Cases cited by the majority lend no support to its judgment that the Cigarette Labeling Act does not preempt product liability suits based on inadequate warning. In *Silkwood v. Kerr-McGee Corp.*, 464 *U.S.* 238, 104 *S.Ct.* 615, 78 *L.Ed.*2d 443 (1984), the Supreme Court deciced in a five-four decision that a claim for punitive damages in an action for injuries resulting from the escape of nuclear radiation was not preempted by the Federal Atomic Energy Act of 1954, 42 *U.S.C.A.* § 2011 et seq. The case is distinguishable. First, unlike the Act herein, the Atomic Energy Act contained no preemption provision whatever. *Palmer v. Liggett Group, Inc.*,825 *F.*2d at 628. Further, the federal legislation reserved significant regulatory authority to the State. *Ibid.* Also, the defendant there was in violation of the federal statute. Here, it is in compliance. In addition, whereas Silkwood was a hapless victim of the nuclear accident, here the decedent voluntarily exposed himself to the risks of smoking in the face of a federally prescribed warning that this would endanger his health.

Finally, in *Silkwood* the Supreme Court specifically found a clear congressional intent that state court tort remedies should remain available to those injured by nuclear incidents. Having done so, it naturally concluded that since punitive damages "have long been a part of traditional state tort law," *Silkwood* 464 *U.S.* at 255, 104 *S.Ct.* at 625, 78 *L.Ed.*2d at 457, they were not preempted by federal law. It should be noted also that unlike jury verdicts which determine the adequacy of labeled warnings and therefore carry a regulatory impact, an award of punitive damages, which addresses a tortfeasor's state of mind and is given consideration only after liability has been determined, has no regulatory effect. In one case a standard is promulgated with which a defendant must comply. In the other, no such standard of

performance is involved.

While it is true, as the majority states, that *MacDonald v. Ortho Pharmaceutical Corp.*, 394 *Mass.* 131, 475 *N.E.*2d 65 (1985), *cert.* den. 474 *U.S.* 920, 106 *S.Ct.* 250, 88 *L.Ed.*2d 258 (1985), decided that compliance with FDA labels on oral contraceptives does not shield manufacturers from liability, it appears that the label requirements in that case merely took the form of a regulation promulgated by the FDA Commissioner who "specifically noted that the boundaries of civil tort liability for failure to warn are controlled by applicable State law." *Id.* 475 N.E.2d at 70.

In *Ferebee v. Chevron Chemical Co.*, 736 *F.*2d 1529 (D.C.Cir.1984), *cert.* den. 469 *U.S.* 1062, 105 *S.Ct.* 545, 83 *L.Ed.*2d 432 (1984), the Court found that plaintiff's claim of inadequate warning had not been preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 *U.S.C.A.* § 136-136y ("FIFRA"), containing labeling requirements complied with by defendant manufacturer. The case differs from this in important respects. There, the federal act "clearly allow[ed] the states to impose more stringent constraints on the *use* of EPA-approved pesticides than those imposed by the EPA." *Ferebee,* 736 *F.*2d at 1541. (emphasis in original). Moreover, under that statute each manufacturer was required to submit to the EPA a warning label for each of the approximately forty thousand different herbicides and pesticide formulations covered by the statute for EPA approval. Thus, two manufacturers of the same regulated product could use different labels so long as they were approved by the EPA. See *Palmer v. Liggett Group, Inc.*, 825 *F.*2d at 628-629, n. 13. The requirement for uniformity in labeling was not a subject of congressional concern and Congress had not taken the trouble, as it did here, to specify the precise warning required.

Finally, in *Burch v. Amsterdam Corp.*, 366 *A.*2d 1079 (D.C.Ct. of App.1976), plaintiff was injured in a flash fire when vapors from defendant's product were ignited by a kitchen stove pilot light. The label of the product was appropriately marked with warnings prescribed under the Federal Hazardous Substances Act, 15 *U.S.C.A.* § 1261(p)(1) (FHSA), which gave notice of its extreme inflammability. Although the Court held that the FHSA did not preempt a state court suit based on failure to warn, unlike the case here there was nothing in that statute from which federal preemption could be implied. The Court made no preemption analysis and stated that it could find "nothing in the statute itself or the legislative history which implies that Congress intended to limit a seller's common law 'duty to warn.' " 366 *A.*2d at 1085.

In my opinion, by allowing challenges to the adequacy of warnings on cigarette labels the Court is licensing a form of legal sanction forbidden by Congress. The federal legislation gives effect to the coordinate goals of protecting the public with minimal consequences to the cigarette industry. It does this by requiring that consumers be informed that cigarette smoking is "dangerous to your health," reflecting a judgment that this was all an ordinary consumer need know to appreciate the risk of smoking and drawing the line at which personal responsibility begins. Implicit in this choice of words is a recognition that the extent to which the warning can be particularized is infinite and that there are few cases of which it can be said that the manufacturer adequately covered the myriad risk possibilities about which a consumer could claim a warning should have been, but was not, given. Although Congress intended to put the matter to rest, the decision of the majority allows for the very chaos which the Act attempts to resolve. Because this conflict breaches settled principles of federal preemption I would affirm the decision of the Appellate Division

Appendix G

as to this issue.[3]

For affirmance in part; for reversal in part; for remandment—Justices CLIFFORD, HANDLER, O'HERN and STEIN, and Judges KING and COLEMAN—6.

Concurring in part; dissenting in part—Judge ANTELL—1.

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3. It is not amiss to note that offensive collateral estoppel has been applied in product liability cases to preclude a producer from denying the inadequacy of a warning found inadequate in a previous case in which the producer defended the claim against a different plaintiff. *Ezagui v. Don Chemical Corp.*, 598 *F.*2d 727 (2d Cir.1979); *Fraley v. American Cyanimid Co.*, 570 *F.Supp.* 497 (D.Colo.1983). Although in *Kortenhaus v. Eli Lilly & Co.*, 228 *N.J. Super.* 162, 549 *A.*2d 437 (1982), the Appellate Division concluded that collateral estoppel would be unfair under the facts presented, its potential applicability in a failure to warn case was recognized. For general contours of the doctrine, see *Restatement, Judgments* 2d § 29 at 291 (1982). Its conceivable implication to a cigarette producter is that once its warning is found inadequate, it could be barred from re-litigating the issue in later suits brought by other consumers. Thus, dissolution of the "maximum" protection to which it is entitled would be complete, and the purpose of the federal program, as to that producer, would be nullified.

APPENDIX H — FRONT PAGE OF ARTICLE "CIGARET CANCER LINK IS BUNK"